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No._____

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IN THE

Supreme Court of the United States

October Term, 1989

NATHANIEL W. TINDALL, II

Petitioner,

versus

THE FLORIDA BAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of speech of the First Amendment as embodied in the Fourteenth Amendment, the determination that statements exposing to the public the conduct of socially prominent lawyers and other individuals, made in a Federal RICO action, naming no particular individual but critical of the attempt to corrupt the judicial system of the State of Florida by relying on friendships with the trial judge, favoritism, and social standing in the community, were sufficient for The Florida Supreme Court to publicly reprimand Petitioner, an attorney, in the total absence of any evidence of actual malice and falsity of the published statements?

2. Whether, consistent with the due process and equal protection clauses of the Fourteenth Amendment, the State of Florida may use race and an undiagnosed mental condition as the basis for disregarding the unimpeachable sworn testimony of Petitioner and then punishing Petitioner for making constitutionally protected statements which are considered as offensive to the interest of certain highly favored and influential members of The Florida Bar?

3. Whether, under the guise of regulating the practice of law, The Florida Bar may attempt to suppress and intimidate the constitutionally protected rights of Petitioner, an Afro-American, while at the same time and involving the same transactions, circumstances, and occurrences, overlooking and disregarding the illegal and unethical conduct of white male members of The Florida Bar who are influential, politically well connected, and socially prominent, basing such distinction on race and an undiagnosed mental condition, without violating the Fourteenth Amendment mandates of due process and equal protection of the laws?

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NATHANIEL W. TINDALL, II

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on September 25, 1989, in the above-entitled cause.

CITATION TO OPINION BELOW

The Florida Bar v. Tindall, 550 So.2d 449(Fla. 1989).

GROUNDS FOR JURISDICTION

The Supreme Court of the State of Florida issued an order on September 21, 1989 publicly reprimanding Petitioner. See, *The Florida Bar v. Tindall,* 550 So.2d 449 (Fla. 1989) (hereinafter cited "Appendix [App.]" 6).

Petitioner's Motion for Rehearing and/or For Clarification Of Decision was denied, and the denial was filed on November 13, 1989. [App. 1].

This court has jurisdiction to grant certiorari in this case pursuant to 28 U.S.C. Section 1257(3) and Supreme Court Rule 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment I:

"Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of Grievances."

U.S. Constitutional Amendment XIII, Section I:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

U.S. Constitutional Amendment XIV, Section I:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

In 1977, Petitioner was approached by a group of people interested in putting together an independent television station in Tampa, Florida under the name of Family Television Corporation. Petitioner was told that the group needed his participation in the venture due to Federal Communications Commission (hereinafter FCC) Regulations requiring minority representation. [T. 140]. (T = Transcript page of testimony taken at Referee Hearing, June 17, 1988).

The group included Louis De La Parte, former President of the Florida Senate, T. Terrell Sessums, former Speaker of the Florida House of Representatives, and former employer and law partner of Petitioner, John A. Grant, Jr., a prominent and

influential state Senator, Ian N. Wheeler, a prominent figure in local Republican Party affairs, and Russell K. Peavyhouse, the law partner of John A. Grant, Jr. De La Parte, Sessums, Grant, and Peavyhouse are attorneys licensed to practice in the State of Florida and are highly considered and favored by The Florida Bar. These individuals are well known in political circles.

The stock subscription agreement executed by the corporation provided for no more than ten shareholders, each owning no less than 10,000 shares of common stock. [T. 145-150]. Petitioner agreed to participate and initially served on the Board of Directors of the Family Television Corporation and attended at least ten Board meetings. [T. 142]. However, contrary to the stock subscription agreement, Petitioner and Reverend Lowry, another black man participating in the venture, were allowed to purchase only 5,000 shares of stock and never given the opportunity to hold 10,000 shares as set forth by the agreement. [T. 147, 149, 150].

At a later date, Petitioner encountered further problems with the other shareholders of Family Television Corporation upon attempting to sell a portion of his stock. [T. 145]. In fact, Petitioner was required to fill out forms and receive approval of the buyers prior to the sale of his stock. [T. 145]. Additionally, Petitioner was required by the group to sell to the law partners and friends of John A. Grant, Jr. and Russell K. Peavyhouse at a price dictated by the group. In contrast John A. Grant, Jr. and Ian N. Wheeler were allowed to sell their shares without restrictions. [T. 146].

Eventually, Family Television Corporation entered into negotiations with Capital Cities Communications to sell the station and its assets. As a portion of that sale, Capital Cities paid a lump sum of money to the stockholders as noncompete funds. Petitioner was told by the principals of Family Television Corporation that he was to receive $31,200.00 in noncompete funds. [T. 153]. However, other participants in the venture received $112,500.00 in noncompete funds. It was explained to Petitioner that membership on the Board of Directors was the

criteria for entitlement to the larger portion of the noncompete funds. [T. 152]. However, there were at least four persons who received the larger sum of money who were not members of the Board of Directors of Family Television Corporation, to wit: Beverly Grant, the wife of John Grant; E. Willis Taylor, Skip Hunt, and George Newell. [T. 152, 153].

As a result of what Petitioner perceived to be an inequitable distribution of noncompete funds, he filed a declaratory judgment action in the circuit court in Hillsborough County in August of 1984. [T. 20]. After several amendments to the pleadings, Petitioner filed a Motion For Partial Summary Judgment based upon the deposition testimony of Mr. Ian Wheeler, the General Manager and President of Family Television Corporation. [T. 25]. On August 21, 1985 a hearing was held on the Motion For Partial Summary Judgment and counsel for Family Television Corporation, Inc. submitted an affidavit of Mr. Wheeler diametrically opposed to the deposition testimony given by Mr. Wheeler and attached to the Motion For Partial Summary Judgment. [T. 25 - 28]. Despite the contradictory deposition testimony and affidavit of Ian Wheeler, the trial court denied Petitioner's Motion for Partial Summary Judgment. [T. 25]. Throughout the case attorney Smith argued to the trial judge that his clients were attorneys and other prominent people who were being subject to prejudice by the mere pendency of the lawsuit. [T. 99, 117 - 118].

Thereafter, the litigation between Petitioner and Family Television Corporation continued to progress until a hearing on May 15, 1986. At this routine motion hearing, Petitioner asked the judge to direct attorneys for Family Television Corporation to turn over certain documents. [T. 23, 24]. That request was denied by the trial judge and Petitioner was instructed to get the information he requested from the FCC in Washington, D.C. [T. 24]. At the conclusion of that hearing, Petitioner accompanied Hugh Smith, Esquire, counsel for Family Television Corporation back to the building in which both of their offices were located. [T. 29]. During their walk, Hugh Smith informed Petitioner that Petitioner would never prevail in this litigation because Judge

Cheatwood, the presiding Judge, and Russell Peavyhouse, one of the named Defendants, were good friends. [T. 29]. Petitioner later learned that Peavyhouse had practiced law with Judge Cheatwood, was a close friend of Judge Cheatwood, and eventually the law firm of John A. Grant, Jr. and Russell Peavyhouse bought Judge Cheatwood's practice when he was appointed to the bench. [T. 172, 173].

As a result of Mr. Smith's representations, Petitioner filed a Motion for Disqualification of Judge Cheatwood in the state court action in June, 1986, setting forth the relationship of Judge Cheatwood and the Defendant, Russell Peavyhouse. In further support, Petitioner offered the contrary testimony and affidavit of Ian Wheeler which resulted in the denial of Petitioner's Partial Summary Judgement Motion. [T. 32]. Although the Motion to Disqualify was scheduled for June 13, 1986 before Judge Cheatwood, Petitioner filed a Notice of Voluntary Dismissal immediately preceding the hearing for strategic purposes, due to the pendency of other motions also set for hearing that day. [T. 36, 37].

Subsequently, on December 31, 1986 Petitioner refiled his case against Family Television Corporation in the United States District Court and in addition to these matters alleged in the state court action, allegations that the Family Television Corporation Defendants "had use (sic) their influence to commit bribery of a public official." Petitioner's allegation was predicated upon the close personal relationship between Russell Peavyhouse and Judge Cheatwood, and the attempt by the Defendants to exploit this relationship.

Thereafter, Petitioner amended his complaint in the United States District Court on May 5, 1987 to include Hugh Smith, Esquire, as a party Defendant. In the Amended Complaint, Petitioner again referred to the close personal relationship between Russell Peavyhouse and Judge Cheatwood, and moreover, again raised the issue of Ian Wheeler's contradictory deposition and affidavit testimony.

Meantime, on January 14, 1987 Hugh Smith wrote a letter of complaint to The Florida Bar which initiated the disciplinary proceedings. [T. 101]. Later Mr. Smith stated his actions were motivated by concern to restore public confidence in the judiciary after "an attack on the judiciary alleging that the judiciary had acted improperly, that is, a specific allegation of a bribe." [T. 111].

The Florida Bar immediately brought charges against Petitioner alleging violations of provisions of the Code Of Professional Responsibility. The Florida Bar filed a one count complaint against the Petitioner which was assigned to a referee, a Circuit Judge from another circuit in the state court system. [App. 54]. Hearings were held on June 17, 1988 and August 26, 1988.

The Florida Bar's case in chief at the hearing on June 17, 1988 was primarily based upon an inquiry into Petitioner's mental state and thought processes at the time the alleged false statements were written. Counsel for The Florida Bar admitted that it was a bit unusual that Petitioner would be called to testify in The Florida Bar's case in chief [T. 15], and later admitted the whole prosecution was unusual. [T. 197 - 198]. Petitioner testified that the statements made were not directed in any matter whatsoever at the judge but were addressed to the conduct of the Defendants in the RICO action. [T. 45]. Petitioner testified of knowledge of the personal relationship between Russell Peavyhouse and the trial judge; the fact that Russell Peavyhouse was once a law partner of the trial judge; and to the fact that Peavyhouse and the trial judge were very close personal friends. Petitioner further testified that Russell Peavyhouse and John A. Grant, Jr., Peavyhouse's law partner and a prominent state politician, purchased the law practice of the trial judge when he was appointed to the bench. Petitioner testified all of the participants in the Family Television group knew of the elaborate illegal scheme John A. Grant, Jr. contrived to avoid his responsibilities to his creditors. Petitioner further testified as to the illegal corporate payments made to Beverly Grant, the wife of John A. Grant, Jr. [T. 140-196].

Petitioner testified T. Terrell Sessums offered money to Petitioner to forget about the relationship between Peavyhouse and the trial judge. This offer came after the Petitioner had filed the Motion to Disqualify [T. 47-50].

The Florida Bar offered no evidence whatsoever to contradict Petitioner's testimony. The Florida Bar did not call Judge Cheatwood, Grant, Peavyhouse, or Sessums to testify to repudiate the testimony of Petitioner.

The Florida Bar's only other witness was Hugh N. Smith. Mr. Smith testified that he never made the statement that Petitioner would lose the action since Peavyhouse and the trial judge were personal friends. [T. 70]. Mr. Smith had little, if any, specific recollection other than his denial of making the statement. [T. 82-116].

Attorney Martin Unger testified Hugh N. Smith made direct threats against the welfare of the Petitioner. This threat was made in the presence of Mr. Unger and two other attorneys. At the time Attorney Unger was a member of the grievance committee in Orlando, Florida which is included in the Ninth Judicial Circuit of the State of Florida. [T. 136-139].

Petitioner was called back to the stand. Counsel for The Florida Bar elicited from Petitioner that the judge involved is white. [T. 196]. Later, off the record, counsel for The Florida Bar stated Petitioner was paranoid and that Petitioner believed all white people were out to injure or harm him. Counsel for the Florida Bar then accused Petitioner of being paranoid. [T. 199]. Petitioner's counsel of record subsequently argued it is easy for The Florida Bar to mix paranoia and racism as the motive for Petitioner's actions. [T. 201-202].

Counsel for The Florida Bar in closing argument, said "one can imagine Judge Cheatwood's reaction when he learned that there was a federal Court suit pending in Tampa, Florida which alleged that he had been bribed." [T. 198]. The Florida Bar further contended it did not matter whether the statement was inartful wording by Petitioner or "a malicious intent to harm

Defendants and Judge Cheatwood, it still serves to be a false accusation against the judge. There's just absolutely no merit to Mr. Tindall's position that Judge Cheatwood was bribed." [T. 199].

The Florida Bar's counsel concludes by stating "again, one can only imagine the reaction of Judge Cheatwood when he heard that he had been referred to as a 'friendly circuit judge' in a federal lawsuit." [T. 200].

At the hearing on August 26, 1988 Petitioner filed a Motion To Declare The Disciplinary Procedure Unconstitutional And In Violation Of The Thirteenth Amendment To The United States Constitution As Imposing A Badge Of Inferiority, [App. 46] and a Motion To Declare DR7-102(A)(1) and DR8-102(B) Unconstitutional In Their Application As being Violative of Due Process, Equal Protection and the First Amendment to the Constitution of the United States. [App. 37].

The referee subsequently made his report recommending the Petitioner be found guilty of violation of DR7-102(A)(1) (asserting a position when it is obvious such action would merely serve to harrass or maliciously injure another), and DR8-102(B) (knowingly making false accusations against a judge) of the Code of Professional Responsibility. The referee recommended that the Petitioner be found not guilty of violations of DR7-102(A) (a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law) DR7-106(C)(6) (in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal) of the the Code of Professional Reponsibility. The referee recommended Petitioner be given a public reprimand for the violations. The referee further recommended the motions filed by Petitioner be denied. This recommendation was not included in the report but in the letter of transmittal to The Florida Supreme Court. [App. 48].

The referee in his report stated that Petitioner's use of the term "public official" in the federal RICO complaints included Judge Cheatwood.

On October 14, 1988 Petitioner filed a petition for review in The Florida Supreme Court seeking a review of the referee's recommended findings of fact, guilt, and discipline.

On February 16, 1989 Petitioner filed a motion to strike the recommendations of the referee since the Petitioner became aware Hugh N. Smith and the referee had a consistency of interest in a major lawsuit involving their respective law firms. [App. 33].

Petitioner then filed on March 21, 1989 a Motion For Appointment Of A Special Circuit Judge To Refer The Unethical And Criminal Conduct Of Hugh N. Smith To The State Attorney's Office Pursuant To Rule 3-7.7 Of The Rules Regulating The Florida Bar Or In The Alternative A Motion To Declare The Rules Regulating The Florida Bar Unconstitutional Since The Florida Bar Administers The Said Rules In A Racially Discriminatory Manner Contrary To The Due Process And Equal Protection Clauses Of The Constitution Of The United States Of America. [App. 9]. The Florida Bar never responded to any of the motions raising constitutional claims.

The Florida Supreme Court on September 24, 1989 issued its opinion accepting the referee's findings of fact, and recommendation. The Florida Supreme Court publicly reprimanded Petitioner. [App. 6]. The opinion did not mention any of the motions filed by Petitioner.

Petitioner filed a Motion For Rehearing and/or Clarification of the Decision on October 4, 1989. The First Amendment question is again raised to The Florida Supreme Court. [App. 2]. Without addressing any of the constitutional claims, The Florida Supreme Court on November 13, 1989 denied the Motion For Rehearing and/or Clarification Of The Decision.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The long, and consistent practice of this Court of making its own independent review and evaluation of the evidentiary fact upon which a lower court's adjudication of constitutional claims is based compels the granting of this petition. *Bose Corporation v. Consumers Union of The United States, Inc.*, 466 U.S. 485 (1984); *In Re Primus*, 436 U.S. 412 (1978); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Time Inc. v. Firestone*, 424 U.S. 407 (1976); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Sherbert v. Verner*, 374 U.S. 398 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Wood v. Georgia*, 370 U.S. 375 (1962); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Thomas v. Collins*, 323 U.S. 516 (1945). This case illustrates the clear wisdom of such a policy of refusing to foreclose reappraisal of a finding that is essential to determination of a constitutional question.

Here the conclusions reached by the referee and The Florida Supreme Court are irreconcilable and troubling. The referee found that the "public official" referred to in the federal RICO complaint included Judge Cheatwood among others. The basis for the referee's conclusion is questionable. Clearly he did not accept the testimony of Petitioner as given. The transcript of the hearing clearly reveals Petitioner's opinion as to bribery was directed not at the conduct of the trial judge but at the Defendants in the lawsuit who were trying to capitalize on the hidden relationship with the trial judge.

Section 838.015, Florida Statutes, provides that bribery may be the act of a public servant or members of the general public. It is not necessary that the public servant be a participant in the scheme. Furthermore, there is no such crime as attempted bribery in Florida. *Craig v. State*, 244 So.2d 151 (Fla. 1971).

The referee found that the statement the "friendly circuit

judge" referred to Judge Cheatwood. The referee made no finding of fact as to the falsity or maliciousness of this statement but did recommend Petitioner be found guilty as charged.

The Florida Supreme Court, after stating it had accepted all of the recommendations of the referee, drew a different conclusion from the evidence. The Florida Supreme Court made a finding of fact that "Petitioner accused the aforementioned circuit judge of unfair disposition of the case and of accepting bribes from the Defendant (sic)." This is diametrically opposed to the finding of the referee and contrary to the evidence. The Florida Supreme Court never mentions the statement about the "friendly circuit judge" which the referee found to be unethical. The opinion makes no evidentiary finding as to the falsity of any statements or malice as required by the decisions of this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964). In light of the constitutional standards, the first inquiry of The Florida Supreme Court should have been whether the statement, standing alone, without explanation subjects its author to discipline. The attorney's later explanation can properly be considered only in mitigation. This is the standard The Florida Supreme Court has used in the past. *The Florida Bar v. Shimek*, 284 So.2d 184 (Fla. 1973). The record is void of any consideration of the statements standing alone. The entire focus is on the alleged harm to the reputation of the "public official."

Attorney disciplinary proceedings in Florida are governed by the rule which requires clear and convincing evidence before the imposition of disciplinary sanctions. *The Florida Bar v. Ragano*, 403 So.2nd 401, 404 (Fla. 1981); *The Florida Bar v. McCain*, 361 So.2nd 700, 706 (Fla. 1978). Petitioner would submit that The Florida Supreme Court, for the reasons set forth below, violated these standards in order to punish Petitioner for exposing the conduct of more respected members of The Florida Bar which threatens the public confidence and integrity of the judicial system.

The referee and The Florida Supreme Court reach irrecon-

cilable conclusions as to the evidence and totally ignored the constitutional claim. The mysterious silent treatment of the constitutional claim raises a very real concern that the evidentiary facts were disregarded in order to reach a conclusion that is contrary to the rights of Petitioner under the First and Fourteenth Amendments of the United States Constitution.

Pursuant to the principles enunciated in the cases hereinabove cited, it is respectfully submitted that this petition should be granted. This court, after an independent evaluation of all the evidentiary facts contained in the record, will be able to determine for itself whether there is merit to Petitioner's contention that the actions of The Florida Bar, as an arm of The Florida Supreme Court, as it administered disciplinary proceedings against the Petitioner infringes on rights of freedom of speech and expression, denies due process and equal protection of the law and raises an effective barrier against those non-favored members of The Florida Bar who must tolerate and be subjected to arbitrary and capricious whims of The Florida Bar in order to cover the unethical and illegal conduct of the more favored members.

II.

That the State of Florida has broad powers to regulate the practice of law is well established. *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217 (1967). However, the State of Florida may not under the guise of prohibiting professional misconduct by an attorney ignore constitutional rights under the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963). The decision of The Supreme Court of Florida does not show a compelling need to curtail criticism of official conduct in light of freedom of speech as defined by the decisions of this court. The net effect of The Florida Supreme Court decision is to develop an unconstitutional method of protecting private reputations of judges and other favored members of The Florida Bar through the device of bar disciplinary proceeding to insulate government and select individuals against attack. This is contrary to the First Amendment prohibition of government restricting the speech of some elements of society

in order to enhance the relative voice of others. *Buckley v. Valeo*, 424 U.S. 1 (1976). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This embraces the liberty to discuss publicly and truthfully all matters of public concern without fear of subsequent punishment. *Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940). Here if the decision of The Florida Supreme Court stands it will serve as an effective barrier to minority and other disfavored lawyers being truly zealous advocates and defenders of the integrity of the judicial system. This subtle form of racism presents an issue that is momentous and calls urgently for consideration and determination by this court.

Petitioner would submit that by "chilling" truthful criticism of public officials by minority and other disfavored individuals, the state will effectively prohibit and limit total societal input and participation in legitimate affairs of the administration of justice. Such a "chilling" effect on speech relating to public figures is not constitutionally permissable. *Hustler Magazine v. Falwell*, _____ U.S. _____, 108 S.Ct. 876 (1988). Individuals similarly situated as Petitioner will fear "bad faith" reprisals by The Florida Bar for the legitimate exercise of valid constitutional rights. When a person becomes an attorney he or she does not surrender the right of freedom of expression. It is only in those instances where an attorney's misconduct threatens a significant state interest can a state restrict an attorney's exercise of his constitutional rights. *Polk v. State Bar of Texas*, 374 F.Supp. 784 (ND Tex., 1974). The Florida Bar shows no significant interest here.

Since *New York Times v. Sullivan*, 376 U.S. 254 (1964) this Court has required that for speech to lose the protection of the First Amendment the published statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Ibid*, at 279-280. This Court extended *Sullivan* to criminal libel prosecutions in *Garrison v. Louisiana*, 379 U.S.

64 (1964) protecting the district attorney, an officer of the Court, for making statements criticizing judges (public officials), and their conduct of the public business. Garrison raised "questions about the racketeer influences on our eight vacation-minded judges." This Court in finding this statement constitutionally protected over the state concern for the reputation of its judges said:

> "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as public reputation, is harmed. The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." (Footnotes omitted).

The Florida Bar, the referee, and The Florida Supreme Court all conclude Petitioner made statements damaging to the reputation and integrity of the trial judge. This is an insufficient reason to repress speech that is truthful. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841-842 (1978). The position taken by the state merely adopts as conclusion of law the allegations made against Petitioner. The Florida Bar does not demonstrate in any manner how the statements of Petitioner caused harm to the judge and, more particularly, what caused these statements to be false. "Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings." *Wood v. Georgia,* 370 U.S. 375, 387 (1962).

Thus concern for the dignity and reputation of the bench does not sustain the public reprimand of Petitioner for publicly exposing the truth about the relationship with the trial judge and the Defendants attempt to influence his decision. *Bridges v. California,* 314 U.S. 252 (1941). For the imposition of punishment

there must be present a clear and present danger of perversion of the course of justice. *Wood v. Georgia, supra.*

The published statement in question did not name the trial judge nor did it identify the "public official." Its protest and its targets were the individual Defendants in the lawsuit. Neither The Florida Bar's relentless passion of the perceived nebulous reference to an unidentified public official nor the concerns for the reputation of the prominent Defendants provides sufficient evidence to sustain a finding that the statements were made against the trial judge. Moreover, the evidence and record do not show anything which would repudiate Petitioner's testimony about the truthfulness of the statements. The court below did not even attempt an exercise to show the falsity of Petitioner's statements but only summarily dismissed the testimony of Petitioner.

We have summarized the evidence above (pp. 1-10) and we shall not repeat it *in extenso*. Suffice it to say that the reference to the "public official" can be validly taken to refer to the trial judge or to several of the Defendants in the lawsuit since under the applicable Florida bribery statute several of the Defendants were considered as public officials. The Florida Supreme Court does not have the license to chose from several conceivable interpretations the one that is most damaging to Petitioner. *Time Inc. v. Firestone*, 424 U.S. 448, 459 (1976). Since The Florida Supreme Court refuses to even consider the constitutional claim its evidentiary finding on liability for the published statement must pass constitutional muster in this court. There must be a sufficient basis in the evidence for the conclusion that the statements contain falsehoods to the trial judge's reputation and the nature of the injury must justify the challenge limitation of expression. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 581 (1971); *NAACP v. Button*, 371 U.S. 415, 442-443 (1963). This court's duty is not only to assure that constitutional protections are respected by the standards in which judgment has been rendered but also "to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris v. Alabama*, 294 U.S. 587, 590 (1935). ACCORD, *Wood*

v. Ga., 370 U.S. 375 (1962) and *Thomas v. Collins*, 323 U.S. 516 (1945).

The Petitioner would submit to this Court that an accurate and fair appraisal of the record on constitutional terms leaves no room for determination that Petitioner has maliciously injured or otherwise made false accusations against a judge. After proper review of the evidence the only conclusion that can be legitimately reached is that The Florida Bar has in "bad faith" punished Petitioner for exposing the corrupt and illegal acts of the more favored members of The Florida Bar.

III.

The most troubling aspect of this case involves the State's attempt to convict and to put Petitioner up to public ridicule and scorn not because of any false published statement but due to a jaded and corrupt inquiry into Petitioner's state of mind at the time of publishing the statement. Petitioner state of mind is essential to prove liability. *Herbert v. Lando*, 441 U.S. 153 (1979). However, by limiting what Petitioner's may think the State has violated the First Amendment right of freedom of thought. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Freedom of mind is given the same security as freedom of conscience. *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

The Rules Regulating The Florida Bar demand an attorney aware of any unethical or illegal conduct to expose such conduct. What the Florida Bar does here is to subject that obligation to its benevolence. This is repugnant to the demands of the First Amendment. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker v. Des Moines School District* 393 U.S. 503, 513 (1969).

Even assuming *arguendo* The Florida Bar has compelling interest in subjecting Petitioner to disciplinary proceedings, such action places a heavy hand on the expression of First Amendment rights when the state will arbitrarily convene disciplinary proceedings against select members of The Florida Bar. Bar dis-

ciplinary proceedings brought in "bad faith" to retaliate for or deter constitutionally protected conduct and/or for the purpose to harass are subject to constitutional challenge. *Bishop v. State Bar of Texas,* 736 F.2d 292(5th Cir. 1984). The Florida Bar cannot, based upon race and other illegitimate reasons, selectively prosecute the alleged wrongdoings of Petitioner and at the same time ignore the far worse actions of others for conduct arising out of the same subject matter, time, and occurrence. Selective prosecution based upon an unjustifiable standard such as race is a denial of equal protection. *Oyler v. Boles,* 368 U.S. 446, 456 (1962). The United States Court of Appeals for the 5th Circuit in *United States v. Kahl,* 583 F. 2d 1351 (5th Cir. 1978) at 1353 held:

> "Selective prosecution, if based on improper motives, can violate the equal protection clause of the fourteenth amendment *Oyler v. Boles,* 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 466 (1962). In order to make out a claim of selective prosecution the defendant must show: first, that others similarly situated generally have not been prosecuted; and second, that the Government's prosecution of him is selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights. *United States v. Johnson,* 577 F.2d 1304, 1308(5th Cir. 1978); *United States v. Murdock,* 548 F.2d 599, 600 (5th Cir. 1977). Kahl contends that he has satisfied these requirements."

ACCORD, *United States v. Gordon,* 817 F.2d 1538(11th Cir. 1987).

The Florida Bar equates the trial judge and the Defendants as one in the same. This is clearly an unwitting attempt to give certain members of the bar a favored position. Under the guise of protecting the reputation and integrity of the trial judge The Florida Bar endeavors to protect the welfare of special members of the bar. Such a reason is not constitutionally permissible. The Florida Bar injects race as a consideration in the proceedings. Although the manner is indirect and coded the end results is the denial of a constitutional right based upon race. Freedom of

speech is protection not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental inference. *Bates v. Little Rock,* 361 U.S. 516 (1960).

"Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana,* 379 U.S. 64 at 74. The First Amendment absolutely prohibits punishment of truth statements. *New York Times v. Sullivan,* 376 U.S. 254 (1964). Here the State can neither show the evilness of malice nor the falsity of the statement. The Florida Bar's election at the disciplinary hearing not to call any witness to repudiate the testimony of Petitioner illustrates the "bad faith" prosecution. The Florida Bar case rest entirely upon the state of mind of Petitioner. *New York Times v. Sullivan* and its progency make it essential to proving liability for a false statement that the focus be the speaker's conduct and state of mind. *Herbert v. Lando,* 441 U.S. 153, 165 (1979). It is in dealing with the state of mind of Petitioner The Florida Bar flagrantly violates the constitutional command. Once Petitioner testified as to what his mental state was at the time of making the statement, then the State cannot go behind those thoughts and twist Petitioner's mental thoughts to reach a perverted result. This whole ordeal has been premised upon the belief that Petitioner intended to maliciously injure the reputation of the judge and his friends. The Florida Bar has gone blindly on a path to convict and to punish Petitioner. Yet, ironically at the same time The Florida Bar so diligently argues Petitioner had an evil purpose to injure the reputation of another it also argues Petitioner is paranoid with racist fears. To establish intent the positions of The Florida Bar are irreconcilable. Malice requires scienter. It is very problematic that a paranoid Negro with racist ideation could form the requisite intent to injure the reputation of a public official. Except for the arguments of the counsel of The Florida Bar at the disciplinary hearing no evidence exist to support this conclusion. Rights of political expression and association may not be abridged because of state interest asserted by counsel for the state without substantial support in the record. *In Re Primus,* 436 U.S. 412, 434 (1978).

The suspiciousness of the State's action can be deemed from the fact that while restricting Petitioner, The Florida Bar otherwise aided and abetted the conduct of the favored attorneys, even to the extent of fostering and promoting false and malicious statements which are not constitutionally protected. The false statements filed in the court proceeding by Attorney Hugh Smith did not cause official sanction to be imposed on such conduct. The Florida Bar's egregious disposition towards First Amendment principles is state action in the most despicable manner. The First Amendment does not permit the government to restrict the speech of some elements of society in order to enhance the relative voice of others. *Buckley v. Valeo*, 424 U.S. 1 (1976). Equal protection requires the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964). Invidious discrimination is repugnant to the equal protection clause. *Harris v. McRae*, 448 U.S. 297 (1980). An obstensibly neutral classification that is applied as an obvious pretext for racial discrimination is unconstitutional. *Personnel Administration of Massachusetts v. Freeney*, 442 U.S. 256 (1979).

The Florida Bar's attempt to demean Petitioner and to apply false labels in the name of protecting the reputation of public officials is no more than a thin veiled means of controlling the thought processes of Petitioner and others like him and to "chill" legitimate thought processes in order to keep certain segments of the legal profession in "their proper place." This court has repeatedly invalidated such repugnant State action "for at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). The Florida Bar's concern for reputation did not flow to the benefit of Petitioner. The Florida Bar argued for the reputation of people it favored despite evidence of their improprieties.

Wide latitude is given in Federal RICO actions. The RICO

statute permits bringing an action for any act involving a predicate act, one of those being bribery, if chargeable under state law. 28 U.S.C. 1961(1)(A). Merely because Defendants fear being stigmatized with the appellation "racketeer" does not place the statute over the constitutional edge. *Sedima, S.P.R.L. v. Imex Company, Inc.*, 473 U.S. 479 (1985).

Injecting race, and applying false mental labels to Petitioner is not a legitimate concern of the state. The sole and only purpose to raise these illegitimate concerns is to apply to Petitioner the badges and incidents of slavery so to telegram to those in positions of power and decision that a descendent of African slavery should be stigmatized. This is contrary to the Thirteenth Amendment. *Civil Rights Cases*, 109 U.S. 23 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

The Florida Bar does not establish a nexus between the proscribed conduct, and Petitioner. Only through the device of race, status, and false labeling does the state establish the illegitimate ends. The very evil The Florida Bar is sanctioned to regulate is what The Florida Bar unmercifully inflict upon Petitioner. The Florida Bar has no legitimate purpose in being the purveyor and promoter of racism, and false accusations as to the mental health of one of its minority members.

Whether The Florida Bar or any state bar association can so abusively treat one of its members in favor of the reputations of other more favored members is a question of paramount importance which should be determined by this Court.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is respectively submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

Nathaniel W. Tindall, II
205 West Buffalo Avenue
Suite 103
Tampa, Florida 33603
Attorney For Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Richard A. Greenberg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 by U.S. Mail on this 7th day of February, 1990.

NATHANIEL W. TINDALL, II

APPENDIX

No._____

IN THE

Supreme Court of the United States

October Term, 1989

NATHANIEL W. TINDALL, II

Petitioner,

versus

THE FLORIDA BAR,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

SCOTT TOZIAN, ESQ.*
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Attorney for Petitioner

**Counsel of Record*

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SUPREME COURT OF FLORIDA

Monday, November 13, 1989

CASE NO. 71,531
TFB No. 87-26,02013D

THE FLORIDA BAR,

Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent.

Respondent's Motion for Rehearing and/or for Clarification of Decision filed in the above cause is hereby denied.

EHRLICH, C.J., OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

TC
cc: Richard A. Greenberg, Esquire
John T. Berry, Esquire
Nathaniel W. Tindall, II, Esquire
Scott Tozian, Esquire

A True Copy

TEST

Sid J. White
Clerk of Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,531
TFB NUMBER: 87-26,02013D
FILE NUMBER: 89-11,387(13D)

THE FLORIDA BAR,

Complainant,

vs.

NATHANIEL W. TINDALL, II,

Respondent.

RESPONDENT'S MOTION FOR REHEARING AND/OR FOR CLARIFICATION OF DECISION

Respondent brings this Motion For Rehearing and/or For Clarification Of this Court's order of September 21, 1989. This Court in punishing Respondent with a public reprimand violates precedence as well as the facts which have been either overlooked or misapprehended. This Court in the case of *The Florida Bar, In Re Paul Shimek Jr.*, 284 So.2d 686 (Fla. 1973), approved the reasoning that for an attorney to be subject to discipline for a statement or memorandum the Court must determine whether the statement, standing alone, without explanation, subjects its author to discipline. The attorney's later explanation can properly be considered only in mitigation. The central statement that is of concern here is "Defendants did commit bribery of a public official." The official is never identified. Neither The Florida Bar nor the referee have accused Respondent of stating Judge Cheatwood accepted a bribe. The record before this Court is totally void of any statements that Respondent said any member of the judiciary had taken a bribe. This Court in its decision of September 21, 1989 reaches a conclusion that is not supported in law or in fact. This Court's misapprehension of the fact that the Respondent never made the accusation that a member of the judiciary accepted the bribe is of paramount importance. The serious constitutional questions raised in this matter would strongly urge that this Court take particular care in not misrepresenting or misstating the facts. The Florida Bar has contended that Respondent suffers from a mental problem, although there is no medical evidence to substantiate this position, and the issue of race has been been injected into these proceedings

by The Florida Bar without any compelling state interest shown. Although this Court has chosen to ignore the constitutional questions raised, at the very least, in order to promote substantial justice, the record should be construed in a reasonable and fair manner. To do otherwise would be a construction of the evidence to fit a predetermined conclusion of guilt.

This Court does have the authority to punish Respondent or any other lawyer for professional misdeeds. However, that authority is not unbridled and must not be in derogation of the commands of the First Amendment of the United States Constitution. If this Court is to punish Respondent it must be for conduct that is not protected by the First Amendment. If Respondent had made clear and unequivocal statements that a member of the judiciary had accepted a bribe, without a doubt this Court's actions would be proper. When, however, from a given state of facts Respondent reaches the legal conclusion "Defendants did commit bribery of a public official" this Courts later conclusion that Respondent said a member of the judiciary accepted a bribe is based upon inference and nothing more. Even Respondent's deposition and later statements at the disciplinary hearing did not in any manner whatsoever implicate Judge Cheatwood in any wrongdoing.

The Florida Bribery Statute, Chapter 838, Florida Statutes, contemplates and has been interpreted in such a manner that the crime can be accomplished either by the acts of a public official, or the acts of any person to give, offer, or promise any pecuniary or other benefit with an intent or purpose to influence an act or omission of public duty. The word "benefit" is defined by 838.014(a), Florida Statutes, as:

> "Benefit" means gain or advantage, or anything regarded by the person to be benefited as a gain or advantage, including the doing of an act beneficial to any person in whose welfare he is interested."

It has never been disputed that Defendant Russell K. Peavyhouse is a close personal friend of Judge Cheatwood. When Judge Cheatwood came on the bench Russell Peavyhouse's law firm bought the practice of Judge Cheatwood. The close personal relationship was never mentioned or brought up until Defendants' attorney boasted to Respondent of the relationship. Several months earlier the perjured and false affidavit of Ian N. Wheeler was filed in the public records of the Circuit Court in order to

defeat a valid Motion For Summary Judgment. The Defendants had argued throughout the proceedings of their status and influence in the community. All things considered is not this enough to reach a colorable legal conclusion that Defendants were trying to influence, and to seek a benefit in the legal proceedings? The allegations of misconduct were directed strictly towards the Defendants in the proceedings. For this Court to surmise from that scenario that Respondent accused a member of the judiciary of accepting a bribe cannot be supported in any sense of civilized justice. "Men are entitled to speak as they please on matters vital to them, and although errors in judgment or unsubstantiated opinions may be exposed, they may not be exposed through punishment for contempt for the expression thereof." *Wood v. Georgia,* 370 U.S. 375 (1962).

This Court should further be mindful that the Federal RICO Statute sanctions civil relief without the necessity of criminal conviction. Under the provisions of 18 U.S.C. Section 1961(1)(A) the *chargeable* state offense of bribery is considered a predicate act. Specifically the statute provides civil relief for *any* act or threat involving bribery. Thus, in the context and circumstances the legal conclusion was made such statement is totally proper. No aspersion can be cast on the judiciary from the statement "Defendants committed bribery of a public official" if it is considered in its proper context.

WHEREFORE, Respondent prays that this court will enter an order granting a rehearing and/or in the alternative clarify what portion of its opinion stating that Respondent said a member of the judiciary "accepted" a bribe.

NATHANIEL W. TINDALL, II
205 West Buffalo Avenue
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Florida Bar #: 176524
(813) 237-3560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Richard A. Greenberg, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and Scott Tozian, Esquire, 109 North Brush Street, Suite 150, Tampa, Florida 33602, by U.S. Mail this 4th day of October, 1989.

NATHANIEL W. TINDALL, II

Sep 25 1989

SUPREME COURT OF FLORIDA

No. 71,531

THE FLORIDA BAR,

Complainant,

vs.

NATHANIEL W. TINDALL, II,

Respondent.

[September 21, 1989]

PER CURIAM.

This disciplinary proceeding is before the Court for consideration of a referee's report filed pursuant to rule 3-7.6 of the Rules Regulating The Florida Bar. We have jurisdiction. Art. V, § 15, Fla. Const.

The respondent, Nathaniel W. Tindall, II, was involved in a declaratory action in which he, as plaintiff, sought a determination of his rights regarding a business transaction. Upon an unfavorable ruling from the circuit judge, the respondent filed a complaint in the United States District Court, Middle District of Florida, alleging racketeering activities on the part of the defendants to the civil action. In the complaint, the respondent accused the aforementioned circuit judge of unfair disposition of the case and of accepting bribes from the defendant. The respondent testified at the final hearing that he had no evidence establishing any improper activity on the part of the circuit judge.

The referee recommended that the respondent be found guilty of violating disciplinary rules 7-102(A)(1) (asserting a position when it is obvious that such action would serve merely to harass or maliciously injure another); and 8-102(B) (knowingly making false accusations against a judge) of The Florida Bar's Code of Professional Responsibility. The referee recommended that the respondent be disciplined with a public reprimand.

We approve all the recommendations in the referee's report. Although the respondent argues that a private reprimand would suffice as discipline in this instance, we believe that his conduct warrants a public reprimand. Had the respondent merely verbalized his accusations in the heat of a bad day in court, perhaps a private reprimand would have been in order. However, the respondent went to the extreme of formalizing his admittedly unsubstantiated, serious charges against a member of the judiciary by including them in a complaint, and later in an amended complaint filed in the United States District Court. We believe this conduct rises above the level of minor misconduct.

Accordingly, we hereby publicly reprimand Nathaniel W. Tindall, II, and the reprimand shall be published in the *Southern Reporter*, Second Series. The Florida Bar's costs in this proceeding are assessed against the respondent. Judgment is entered against Nathaniel W. Tindall, II in the amount $1,501.05, for which sum let execution issue.

It is so ordered.

EHRLICH, C.J., and OVERTON, MCDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Richard A. Greenberg, Assistant Staff Counsel, Tampa, Florida,

for Complainant

Scott K. Tozian of Smith and Tozian, P.A., Tampa, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,531
TFB #: 87-26,02013D

THE FLORIDA BAR,

Complainant,

vs.

NATHANIEL W. TINDALL, II,

Respondent.

RESPONDENT'S MOTION FOR APPOINTMENT OF A SPECIAL CIRCUIT JUDGE TO REFER THE UNETHICAL AND CRIMINAL CONDUCT OF HUGH N. SMITH TO THE STATE ATTORNEY'S OFFICE PURSUANT TO RULE 3-7.7 OF THE RULES REGULATING THE FLORIDA BAR OR IN THE ALTERNATIVE, MOTION TO DECLARE THE RULES REGULATING THE FLORIDA BAR UNCONSTITUTIONAL SINCE THE FLORIDA BAR ADMINISTERS THE SAID RULES IN A RACIALLY DISCRIMINATORY MANNER CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

COMES NOW Respondent and brings this Motion for Appointment of a Special Circuit Judge to Refer the Unethical and Criminal Conduct of Hugh N. Smith to the State Attorney's Office pursuant to Rule 3-7.7 of The Rules Regulating The Florida Bar, Or, In The Alternative, Motion to Declare The Rules Regulating The Florida Bar Unconstitutional Since The Florida Bar Administers the Said Rules in a racially discriminatory manner contrary to the Due Process and Equal Protection Clauses of The United States Constitution, and in support thereof Respondent would show to this Court:

1. That this matter is before this Court on the Florida Bar's complaint against Respondent for alleged conduct that is familiar to this Court and need not be unnecessarily recited herein.

2. That Respondent drafted a letter on or above February

22, 1988, to The Florida Bar advising of the unethical and criminal conduct of Hugh N. Smith, Esquire. (Copy of said letter is attached hereto).

3. That The Florida Bar requested the response of Hugh N. Smith, Esquire, to said letter. (Copy of said letter is attached letter is attached hereto).

4. That Hugh N. Smith responded to said letter.

5. That The Florida Bar referred this matter to a Grievance Committee of the Thirteenth Judicial Circuit. (Copy of said transmittal letter is attached hereto).

6. That Respondent was never contacted by the Grievance Committee for any information about the conduct of Mr. Smith nor were any other individuals who had knowledge of the conduct of Mr. Smith contacted.

7. That contrary to Rule 3-7.3(h), of The Rules Regulating the Florida Bar, the Respondent herein was never given an opportunity to state in explicit and complete details the unethical and criminal conduct that Hugh N. Smith committed nor was Respondent called to come before the Grievance Committee.

8. That Respondent received a letter dated February 27, 1989 advising that the Grievance Committee had issued a finding of no probable cause.

9. That the conduct engaged in by Hugh N. Smith involved:

a. Perjury

b. Misrepresentations before a tribunal

c. Corruption of the Judicial System of the Thirteenth Judicial Circuit

d. Lying and misrepresenting the holdings of cases before a tribunal. The proceedings were transcribed by a court reporter.

e. Threats made against Respondent in the presence of three members of The Florida Bar including a member of one of the Grievance Committees of the Ninth Judicial Circuit.

f. A pattern of lying, dishonesty, and unethical behavior for the calculated purpose of gaining a tactical advantage in legal proceedings.

10. That as this Court is aware from documents already filed in this matter, Hugh N. Smith was deeply involved in the perjury committed by Ian Wheeler.

11. That Rule 3-4.3 of The Rules Regulating The Florida Bar states:

> The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibitive acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

12. That Rule 4-3.3 of The Rules Regulating The Florida Bar states:

> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of material fact or law to a tribunal;
>
> (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer which enable the tribunal to make an informed decision, whether or not the facts are adverse.

13. That Rule 4-3.4 of The Rules Regulating The Florida Bar states:

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence; or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding. A lawyer shall not assist another person to do any such act.

(b) Fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) Knowingly disobey an obligation under the rules or a tribunal except for an open refusal based on an assertion that no valid obligation exist.

(d) In pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of the credibility of a civil litigant, or the innocence of an accused.

14. That Rule 4-3.5 of The Rules Regulating The Florida Bar states:

(a) A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

15. That Rule 4-8.4 of The Rules Regulating The Florida Bar states:

A lawyer shall not:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official; or

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

16. That the conduct of Hugh N. Smith clearly comes within the purview of The Rules Regulating The Florida Bar and at the very least such conduct warrants a full investigation.

17. That throughout these disciplinary proceedings against the Respondent, The Florida Bar has maintained that the Respondent was "a paranoid individual who would allege in a lawsuit that a group of lawyers and prominent individuals in the Tampa Bay area are out to harm him or cause him physical damage." (Page 199 of the Transcript of Disciplinary Proceedings).

18. That The Florida Bar in taking such a position confuses conduct with social standing. A lawyer's social standing does not immune his unethical conduct from being the subject of an investigation.

19. That these same, individuals, supposedly "good

people", were encouraging, aiding, and abetting the perjury of Ian N. Wheeler, as well as the unethical and criminal conduct of Hugh N. Smith.

20. That if such supposedly "good people" could blatantly support perjury in official court documents open for public inspection, then these same people could and did encourage Hugh N. Smith threats against Respondent's welfare.

21. That The Florida Bar injected race as an issue in the disciplinary proceedings for no apparent reason. (Page 196 Transcript of Disciplinary Proceedings).

22. That by injecting race, and labeling Respondent as paranoid without any supporting medical evidence, The Florida Bar has violated the Thirteenth Amendment prohibitions of all shades and conditions of African slavery. *Slaughter-House Cases,* 83 U.S. 36 (1873).

23. That the record is totally devoid of any expert testimony or medical evidence to indicate that the Respondent was or is under any mental disability or suffered any psychotic delusions.

24. That, however, the record is clear that Ian Wheeler did commit prejury; that Hugh N. Smith did lie in official judicial proceedings several times; that Hugh N. Smith did misrepresent facts to a tribunal, and that Hugh N. Smith did threaten the welfare of the Respondent in the presence of three members of The Florida Bar.

25. That Hugh N. Smith was at the very heart of a conspiracy to take advantage of a close personal relationship between the Trial Judge and Russell K. Peavyhouse so that the perjury of Ian Wheeler could be overlooked.

26. That Hugh N. Smith did take advantage of the close relationship by arguing who his clients were, their prominence and social standing and did falsely and maliciously cause a fraudulent and deceptive order to be entered by the trial court.

27. That Hugh N. Smith testified at the disciplinary hearing of Respondent that he saw nothing inconsistent with the deposition testimony of Ian N. Wheeler of December 17, 1984 and the later affidavit of Ian N. Wheeler filed in opposition to Motion For Summary Judgment. (Pages 96-99 of Transcript of Dis-

ciplinary Proceedings).

28. That Hugh N. Smith later admitted that his January 14, 1987 letter to The Florida Bar stating Respondent had not taken an appeal of the dismissal of the RICO count in the state court action was incorrect.

29. That Hugh N. Smith did subsequently misrepresent in United States District Court, and in the Eleventh Circuit Court of Appeals that Respondent had not taken an appeal of the dismissal of the RICO count in the state court action.

30. That throughout Hugh N. Smith's testimony at the Disciplinary Hearing he claims no knowledge or cannot remember certain documents or statements made since his associate may have prepared the document or made the statement.

31. That Hugh N. Smith was responsible for the acts or omissions of his associate. Mr. Smith at all times ratified the conduct, and failed to take any remedial action to mitigate omissions of his associate. Mr. Smith at all times ratified the conduct, and failed to take any remedial action to mitigate the wrongs done by the associate. Per Rule 4.5-1(c) of The Rules Regulating The Florida Bar, Hugh N. Smith is responsible for the acts of his associate.

32. That the perjury of Ian N. Wheeler is the responsibility of Hugh N. Smith.

33. That The Florida Bar knows of this unethical and illegal conduct of Hugh N. Smith but due to the color of his skin, his social standing in The Florida Bar, the prominence of his clients, his client's relationship with a judge, and other factors that have no merit as to the responsibility for conduct, The Florida Bar allows Hugh N. Smith to enjoy immunity from the consequences of his behavior, and instead has sought to make Respondent endure punishment for speaking out against clear unethical conduct.

34. That the Grievance Committees of The Florida Bar serve as the Grand Jury to determine if probable cause exist to bring disciplinary charges of unethical and criminal conduct.

35. That racism in the Grand Jury process is unconstitutional in violation of the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution. In *Rose v. Mitchell*, 443 U.S. 545 (1979) at page 551 Justice Blackmun states:

> For nearly a century, this Court in an unbroken line of cases has held that "a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race." *Alexander v. Louisiana*, 405 U.S. 625, 628, 92 S.Ct. 1221, 1224, 31 L.Ed.2d 536 (1972); *Bush v. Kentucky*, 107 U.S. 110, 119 1 S.Ct. 625, 633, 27 L.Ed. 354 (1883); *Neal v. Delaware*, 103 U.S. 370, 394, 26 L.Ed. 567 (1881). See *Castaneda v. Partida*, 430 U.S. 482, 492-495, and n. 12, 97 S.Ct. 1272, 1278-1281, and n. 12, 51 L.Ed.2d 498 (1977). A criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." *Alexander v. Louisiana* 405 U.S., at 628-629, 92 S.Ct., at 1224. Accordingly, where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed. E.g., *Hill v. Texas*, 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942).

36. That although this matter involves a disciplinary proceeding, the Florida Bar cannot selectively decide based on race, and other unlawful reasons to selectively prosecute the alleged wrongdoings of Respondent, and at the same time ignore the conduct of Hugh N. Smith arising out of the same matter. Selective prosecution based upon an unjustifiable standard such as race is a denial of equal protection. *Oyler v. Boles*, 368 U.S. 446, 456 (1962). The Fifth Circuit in *United States v. Kahl*, 583 F.2d 1351 (5th Cir. 1978) at 1353 held:

> "Selective prosecution, if based on improper motives, can violate the equal protection clause of the fourteenth amendment. *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 466 (1962). In order to make out a claim of selective prosecution the defendant must

> show: first, that others similarly situated generally have not been prosecuted; and second, that the Government's prosecution of him is selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights. *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977). Kahl contends that he has satisfied these requirements."

37. That in *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987) a black defendant was charged with voting fraud. Defendant charge selective or discriminatory prosecution. The Government chose to prosecute defendant and other black political leaders in Alabama's majority-black "Black Belt" counties for voting fraud, while not prosecuting county residents who were members of a rival white-dominated political party and who had committed similar election offenses. A Department of Justice spokesperson had publicly stated the investigations were of a "new policy . . . brought on by the arrogance on the part of blacks in these counties." The Court ruled the defendant had made a "colorable entitlement to the defense, and remanded to the District Court for a full evidentiary hearing.

38. That this Court in *State v. Slappy*, 522 So.2d 18 (Fla. 1988) at page 20 made this observation about racial discrimination judicial proceedings:

> "Despite continuing efforts, racial and other discrimination remains a fact of this nation's evolving history. The United States Supreme Court has characterized it as a problem needing unceasing attention. *McCleskey v. Kemp*, _____ U.S. _____, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262, rehearing denied, _____ U.S. _____, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987). As the Supreme Court elsewhere has noted:
>
> > [W]e . . . cannot deny that, 114 years after the close of the War Between the States . . . , racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558-59, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979).

> One would think it unnecessary to point out again, as did the court in *Boston v. Kentucky*, 476 U.S. 79, 87-88, 106 S.Ct. 1712, 1717-18, 90 L.Ed.2d 69 (1986) (citation omitted) (quoting *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 308, 25 L.Ed. 664 (1879), that "[d] "[d]iscrimination within the judicial system is [the] most pernicious." It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being—to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large."

39. That such discrimination is particularly odious when one attorney is favored over another attorney due to race.

40. That The Florida Bar contends that Respondent suffers from what may be described in a colloquially vulgar manner as the "crazy-nigger syndrome", i.e., that is the antiquated belief that Negroes who speak up to the misdeeds and misgivings of white people are dangerous and should be put in their place. The belief is that this is a dreaded infliction that is contagious, and may reach eqidemic portion among the Negro population unless immediate action is taken. The proven remedy is to tie the offending Negro to the whipping post for public display to "chill" any other Negro who may have such foolish thoughts.

41. That the charges leveled against Hugh N. Smith are valid and are clearly within the area of conduct proscribed by The Rules Regulating The Florida Bar.

42. That, however, the local Grievance Committee, upon which no Black is a member of, and in fact of the five Grievance Committees of the Thirteenth Judicial Circuit there is not one Black member, has decided summarily, without interviewing any witnesses or doing any worthwhile investigations, that Hugh N. Smith has not violated any of the rules governing the conduct of the members of the Florida Bar.

43. That The Florida Bar has unwittingly established two

different standards of discipline for attorneys based entirely on race. If the complaining party is a white attorney and the Respondent is a Black attorney, The Florida Bar will vigorously prosecute the conduct and diligently investigate the alleged charges. However, if a Black attorney complains of unethical conduct of a white attorney, The Florida Bar will bend over backwards not to properly investigate the matter and will use the Grievance Committee as means of covering-up the wrongdoings of the white attorney.

44. That the Grievance Committee procedure is unconstitutional in that The Florida Bar has systematically, purposely, willfully, and intentionally excluded Black attorneys from sitting on the Grievance Committees of the Thirteenth Judicial Circuit of Florida.

45. That the purpose of this exclusion is to prevent Black attorneys from receiving due process and equal protection of law as required by the United States Constitution and the Constitution of the State of Florida by stignatizing Black members of The Florida Bar by purposely, willfully, and intentionally subjecting the Black members of The Florida Bar to a different and higher standard of conduct than other members of The Florida Bar contrary to the clear meaning and intent of the Rules Regulating The Florida Bar.

46. That The Florida Bar has arbitrarily, and capriciously prosecuted Respondent because of race, and other unlawfully purposes which are clearly in violation of the United States Constitution, and the Constitution of the State of Florida.

47. That by prosecuting the Respondent and condoning the behavior of Hugh N. Smith, The Florida Bar has told the public that discipline shall be based upon race, social standing of the clients the attorney represents, friendships with trial judges, political persuasion, social convictions, financial relationships and social contacts.

48. That Hugh N. Smith is either a proven pathological liar or an individual who suffers from infirmity and/or dependency which selectively prevents him from remembering unethical and criminal conduct. The inconsistent statements and the inconsistent actions of Mr. Smith have not been questioned by The Florida Bar when fact the rules governing The Florida Bar clearly indicate unethical conduct.

49. That at the very least, if for no other reasons, the perjury of Ian Wheeler is the responsibility of Hugh N. Smith and Hugh N. Smith should be held accountable for such conduct.

50. That a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. *N.A.A.C.P. v. Button,* 371 U.S. 415, 439, citing *Schware v. Board of Bar Examiners,* 353 U.S. 2323 *Konigsberg v. State Bar,* 353 U.S. 252 and *In re Sawyer,* 360 U.S. 622.

51. In Konigsberg v. State Bar of California, 353 U.S. 252 (1957) Petitioner refused to answer questions of the Bar Examiners' relating to his political associations asserting First Amendment rights. The United States Supreme Court upheld Petitioners right to assert a First Amendment claim stating at page 272 of the decision that:

> "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association. A bar composed a lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar."
> (Citations Omitted).

52. That The Florida Bar's refusal to treat all members on an equal basis and to apply the same standard of conduct equally to all members gives reason to the legal profession's many, and varied detractors who herald that the legal profession is only concerned about its privileged members.

53. That most recently this Court in the case of *The Florida Bar v. Anderson and McClung,* _____ So.2d _____ (Fla. 1989), 14 Fla. Law Week 79 (Fla. 1989) suspended one attorney, and issued a public reprimand to another attorney for making a misrepresentation in an appellate brief. This Court's view of the imposition of discipline was stated in this manner:

> "The Bar next argues that reprimands are inadequate discipline and that both respondents should

be suspended for a period of sixty days. In support, the Bar points out that section 6.12 of Florida Standards for Imposing Lawyer Sanctions, which was approved by the Board of Governors in November 1986, provided that a suspension is appropriate where the misconduct is prejudicial to the administration of justice or involves dishonesty, fraud, deceit, or misrepresentation to a court and no remedial action is taken. Respondents argue that they were negligent but did not knowingly misled the court. In their view, section 6.14 of the standards is the applicable guideline."

"In reviewing a referee's recommendations for discipline, our scope of review is somewhat broader than that afforded to finds of facts because, ultimately, it is our responsibility to order an appropriate punishment. *The Florida Bar in re Inglis,* 471 So.2d 38, 41 (Fla. 1985). Discipline must be fair to the public and to the respondent and must be severe enough to deter others who might be prone or tempted to become involved in like violations. *The Florida Bar v. Lord,* 433 So.2d 983, 986 (Fla. 1983) (emphasis in original). We agree, in part, with the Bar's recommendations of discipline. By their actions, respondents violated their responsibilities as officers of the court. We agree with the Bar that private and public reprimands for respondents Anderson and McClung, respectively, are inadequate. Accordingly, we order that respondent McClung be suspended for a period of thirty days and that respondent Anderson be publicly reprimanded through publication of this opinion."

54. That in the instant matter if The Florida Bar had properly and fully investigated the charges against Hugh N. Smith it would have been discovered that Mr. Smith made several misrepresentations to a tribunal including but not limited to:

a. Citing cases to support his position when in fact the cases supported the opposition.

b. Filing the perjured affidavit of Ian I. Wheeler.

c. Appearing before a tribunal when Mr. Smith knew opposing counsel would not be present, and misleading the Court so as to have a favorable order entered.

d. Advising The Florida Bar that Respondent had not taken an appeal of a order dismissing with prejudice a RICO court of a complaint. Mr. Smith later retracted this remark. However, Mr. Smith argued the same misleading statement in written documents filed in United States District Court, and in an appellate brief filed in Eleventh Circuit Court of Appeals.

55. That, however, The Florida Bar dismisses the charges against Mr. Smith since a member of The Florida Bar who is of the wrong race, persuasion, and social standing makes the complaint of unethical conduct. Thus, The Florida Bar's *de facto* disciplinary process is initiated in an unconstitutional manner based on race, wealth, social standing, other impermissible purposes which changes The Rules Regulating The Florida Bar from being a constitutionally neutral statement of expected conduct to being in application a racist and bias exercise of administrative fiat.

56. That The Florida Bar makes Rule 4-8.3 of The Rules Regulating The Florida Bar meaningless when it condones, and sanctions the unethical and criminal conduct of a white attorney when the complainant is a black attorney.

57. That Hugh N. Smith testified at the Disciplinary Hearing of Respondent that one of his clients hired an investigator to investigate Respondent. (Page 108 of transcript). That as a result of this investigator's report Mr. Smith wrote that Respondent had been accused of fraudulent conduct. In fact this was a false statement in violation of Rule 4.4-1 of The Rules Regulating The Florida Bar. If The Florida Bar had properly investigate this matter it would have discovered that this same investigator had been hired by Respondent's office to investigate confidential matters of Respondent's clients. However, The Florida Bar is not concerned about the Respondent's attorney-client relationships with his clients. The Florida Bar is telling the public in effect that the confidentiality of the attorney-client relationship will be protected based on the race of your attorney. If the public uses the legal services of a black attorney, a different standard will apply to the invasion of privacy of that attorney-client relationship if the unethical and illegal perpetrator is a white attorney.

58. That The Florida Bar has purposely and willfully failed to protect the rights and interest of the public based solely on

the race of the attorney representing the client. Such selective protection of the interest of the public is unconstitutional in violation of the United States Constitution, more particularly, the First, Fourth, Ninth, and Fourteenth Amendments, and the Constitution of the State of Florida.

59. That in the case of *Goldsmith, et. al v. Smith and Fuller P.A., and Hugh N. Smith,* Case Number 88-17723, Thirteenth Judicial Circuit, an action for breach of contract and unjust enrichment was brought against Hugh N. Smith. Mr. Smith is accused of refusing to promptly return to a client monies held in trust. That The Florida Bar was made aware of this action. However, due to the different standard of conduct applicable to members of The Florida Bar based entirely on race, social standing, wealth and other suspect classifications, The Florida Bar has refused to hold Hugh N. Smith responsible and accountable for his unethical conduct. Hugh N. Smith is a threat to the public and The Florida Bar's failure to hold him accountable will result in serious injury to the public. result in serious injury to the public.

60. That "bad faith" Bar disciplinary proceedings were brought to retaliate for or deter constitutionally protected conduct or for the purpose to harass are subject to constitutional challenge. *Bishop v. State Bar of Texas,* 736 F.2d 292 (5th Cir. 1984).

61. That a single invidiously discriminatory governmental act is constitutionally repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977).

CONCLUSION

The Florida Bar seeks to hold Respondent to an entirely different standard of conduct than Hugh N. Smith for conduct arising out of the same circumstances, and subject matter. The conduct of Respondent in no shape or form approaches the constitutional questions. As such the high ethical standards heralded by The Florida Bar are no more than a cruel hoax perpetrated on the People of the State of Florida.

WHEREFORE, Respondent prays that this Court will grant the relief sought herein, and such other relief as the Court may deem equitable and just.

NATHANIEL W. TINDALL, II
205 West Buffalo Avenue
Suite 103
Tampa, Florida 33603
(813) 237-3560
Florida Bar #: 176524

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Richard A. Greenberg, Esquire, Assistant Staff Counsel, the Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and Scott Tozian, Esquire, 109 North Brush Street, Suite 150, Tampa, Florida 33602, by U.S. Mail this 21st day of March, 1989.

NATHANIEL W. TINDALL, II

THE FLORIDA BAR

Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

CONFIDENTIAL

February 27, 1989

Nathaniel W. Tindall, II
205 West Buffalo Avenue
Suite 102
Tampa, Florida 33603-3601

RE: Complaint against Hugh Smith
File No. 89-10,158 (13A)

Dear Mr. Tindall:

The Grievance Committee has instructed me to inform you that a finding of No Probable Cause was reached in the above-referenced matter.

In order to bring a disciplinary action against an attorney, there must be clear and convincing evidence of a violation of the Rules Regulating the Florida Bar.

You still have the right to consult with an attorney of your choice concerning your legal position.

Sincerely,

/s/ Thomas E. DeBerg
Thomas E. DeBerg
Assistant Staff Counsel

TED/dlt

cc: Hugh Smith, Esq.

LAW OFFICES OF
NATHANIEL W. TINDALL, II

NATHANIEL W. TINDALL, II

SUITE 103
205 WEST BUFFALO AVENUE
TAMPA, FLORIDA 33603
(813) 237-3560

CLEARWATER-ST. PETERSBURG (813) 443-1835
BRADENTON-SARASOTA (813) 748-2952

PLEASE REFER TO FILE NO._____

February 22, 1988

The Florida Bar
Suite C-49
Tampa Airport Marriot
Tampa International Airport
Tampa, Florida 33623

RE: Complaint of: Hugh N. Smith, Esquire against
Nathaniel W. Tindall, II, Esquire
File Number: 87-1362

Ladies and Gentlemen:

As you are aware Hugh N. Smith, Esquire has charged me with certain unethical conduct arising out of litigation that was first within the Court System of the State of Florida and subsequently in the Federal Court System. I think it is appropriate that The Florida Bar be aware of certain conduct of Mr. Smith, and his clients.

On May 15, 1985 a hearing was held in the file of Tindall v. Family Television Corporation et. al., Case Number: 84-12436, Division: "F", In the Thirteenth Judicial Circuit of Florida, before the Honorable Morton J. Hanlon. At that time Mr. Smith represented to Judge Hanlon that his clients were entitled to judgment on the pleadings for several reasons. Mr. Smith represented to the Court a specific case holding as being authority

for his position. (A copy of the transcript is enclosed herewith. Please see specifically pages 14-16). Upon returning to my office after the hearing I read the case cited by Mr. Smith as authority for his position. The case supported my position and Mr. Smith was not entitled to Summary Judgment since the pleadings in the case had not been closed. I immediately dictated a letter to Judge Hanlon about the misrepresentations made by Mr. Smith. The letter is dated May 17, 1985. (A copy of the letter with attachments is enclosed herewith). Judge Hanlon stated that in light of the issues raised by my letter that a rehearing was appropriate.

On the afternoon of May 30, 1985, at approximately 4:30 p.m., Mr. Smith sent to my office a Notice of Hearing for May 31, 1985 at 9:30 a.m. Mr. Smith knew that I was in trial and would not be able to attend the hearing. Fortunately when the Notice of Hearing arrived I was in my office and I called both Mr. Smith's office and Judge Hanlon's office and advised them that because of prior commitments I would not be able to be present. I also sent a letter to Mr. Smith's office advising them that I would not be able to attend the hearing (A copy of the letter May 30, 1985 is attached with Notice of Filing dated July 16, 1985). The next morning Mr. Smith went to Judge Hanlon's office with three (3) Proposed Orders all favorable to his interest. I later learned that Mr. Smith advised Judge Hanlon that I had no objections about the Orders and that I had agreed in principle to the Proposed Orders and it did not matter which particular Order the Judge entered. When I received the Order, still not knowing what had occurred, I filed a Motion to Amend the Order as being violative of procedural due process. (See copy of Motion To Amend Order having a certificate date of June 7, 1985 attached hereto). Only at a later hearing on July 16, 1985 did I become fully aware of what Mr. Smith had done. At the July 16, 1985 hearing Mr. Smith admitted that he knew I would not be able to be present at the hearing on May 31, 1985 and that he did take three (3) Proposed Orders to Judge Hanlon's office. (A copy of the transcript of the May 15, 1985 hearing is attached hereto. Please see specifically pages 4-5). The fact of what Mr. Smith did is further established in the deposition testimony of his assistant Nathan Goldman, Esquire. (A copy of the deposition of Nathan Goldman, Esquire is attached hereto. Please see specifically pages 8-19).

Mr. Smith at the hearing on July 16, 1985 admitted receiving my letter to Judge Hanlon, and admitted that the hearing was scheduled on short notice (see page 4 line 2 of the transcript of July 17, 1985). The irony of Mr. Smith's contention is the fact

that the letter to Judge Hanlon is dated May 17, 1985. Since Mr. Smith and I were in the same building I had his copy of the letter hand-delivered that same day. However, it took him thirteen (13) days to schedule and notice a hearing for May 31, 1985. Mr. Goldman, however, recalled the short notice being necessary for an emergency hearing. (See pages 9, line 10, and page 18, line 6 of Deposition of Nathan Goldman). When asked what was the emergency Mr. Goldman claimed attorney-client privilege. (See page 19, line 4 of Deposition of Nathan Goldman).

On December 17, 1984, Mr. Smith's client Ian N. Wheeler stated unequivocally in deposition that several stock options given by Family Television Corporation to certain individuals were without consideration. (A copy of the deposition of Ian N. Wheeler including attachments is enclosed herewith. Please see specifically page 16, lines 22-23). Mr. Wheeler also stated that there was never any doubt about including the optionees in sharing the proceeds from the sale of the assets of Family Television Corporation. (Page 22, lines 22-23). Mr. Wheeler further stated that he could not recall the optionees ever threatening a lawsuit (Page 24, line 23). The option holders were paid several million dollars at the time the assets of Family Television Incorporation were sold to Capital City Communications Incorporation. If the stock options were given without consideration then the sums paid to these individuals were illegal payments. At a later date in sworn Interrogatories Mr. Wheeler again stated that there was no known consideration for the stock options. (See copy of sworn interrogatories attached hereto). Mr. Wheeler read at his deposition a memo that traced the history of Family Television Corporation and contained in the memo was a statement by Mr. Wheeler that the options were given without consideration. (A copy of the memo is attached to Mr. Wheeler's deposition).

A Motion for Partial Summary Judgment was filed concerning the fact that there was no consideration for the stock options. A day before the Summary Judgment hearing Mr. Smith filed an Affidavit executed by Mr. Wheeler denying that the stock options were given without consideration. The Affidavit of Mr. Wheeler further stated that the option holders were threatening litigation that would potentially prevent the sale of the assets of Family Television Corporation. (A copy of the Affidavit of Ian N. Wheeler is attached hereto along with the Notice of Filing). The shocking thing about the Affidavit of Mr. Wheeler is not that he changes any of his earlier sworn statements but that he denies ever saying that there was no consideration for the stock

options. As a result of this Affidavit being filed the Trial Judge, over strenuous objections, denied Summary Judgment. (A copy of the transcript of the hearing on the Motion for Summary Judgment is attached hereto). At the hearing Mr. Smith's assistant argued that Mr. Wheeler testified at his deposition as an individual not as a corporate representative (page 10, line 10 of the transcript). In fact this was a complete falsehood. Mr. Wheeler at page 41 of his deposition clearly and unequivocally stated that he was testifying as a representative of Family Television Corporation. The Trial Judge accepted the insubstantiated arguments of Mr. Smith's assistant that consideration came in the forbearance of threatened litigation by the option holders (pages 10-12; pages 14-16).

Mr. Smith on or about May 15, 1986 told me that I would never prevail in the lawsuit because the Trial Judge and his client Russell K. Peavyhouse were close friends. I was shocked, and afraid. I hoped this statement was not true. I eventually filed a Motion To Disqualify, and an Affidavit. (Copies of the documents are attached hereto). I decided that under the circumstances it would be best to resolve this dispute elsewhere. I took a Voluntary Dismissal of the suit. Amazingly enough even after the dismissal of the suit Mr. Smith and his clients authorized an intermediary to settle the dispute. In fact, the intermediary offered a full apology, and a full share of the Non-Compete funds. However, I still wanted an explanation as to the alleged relationships. I was never given an explanation. Only when the action was refiled in Federal Court did Mr. Smith and his clients become concerned about what Mr. Smith himself had told me earlier.

During the course of the litigation in state court Mr. Smith filed a counter-claim alleging Abuse of Process. I filed a Motion to Dismiss, the same Motion to Dismiss that was pending at the time of the hearing on the Motion for Judgment on the Pleadings. After the counter-claim was filed Mr. Smith approached me and stated that his client, Attorney Louis de la Parte, acting on behalf of the Board of Directors of Family Television Corporation, had instructed him that if I would drop the law suit that Mr. de la Parte would dismiss the counter-claim for Abuse of Process. Failure to dismiss the law suit would result in me getting into "serious trouble". I refused and the trial court eventually dismissed the counter-claim with leave to amend which Mr. Smith never did. (A copy of the counter-claim is attached hereto).

Mr. Smith filed law suits on behalf of Ian N. Wheeler, Henry

Ash, and himself against me. On April 17, 1987 Mr. Smith scheduled my deposition in these three (3) cases. I appeared at his office with three lawyers who are representing me. During the course of that meeting Mr. Smith made the statement to my attorneys that he knew what was being done to me was basically wrong but that "no one takes a shot at me and gets away with it." Mr. Smith also said that he had been instructed by his client Henry Ash to ruin me if I did not settle the Federal Court action within the next seven to ten days. (See affidavit of Scott Tozian, Esquire, attached hereto).

These remarks of Mr. Smith came after his March 20, 1987 letter to Martin B. Unger, Esquire, one of the attorneys representing me in the suits Mr. Smith have filed. At page five (5) of his March 20, 1987 letter Mr. Smith states that it was alleged that in one of two 1982 law suits involving American Health Insurance Company and Metropolitan Life Insurance Company that I had engaged in fraudulent conduct. I wrote to the two attorneys involved and asked them if their respective clients had ever accused me of fraud. Both attorneys advised me that their respective clients had made no such allegations. (A copy of page 5 of Hugh N. Smith's letter of March 20, 1987 to Martin B. Unger, Esquire is attached as well as the responses of Andrew M. Brown, Esquire and Norman Stallings, Jr., Esquire). Mr. Smith in his letter stated that I was elected to the Board of Directors of Family Television Corporation but that I was not re-elected to the board when I failed to attend a single meeting of the board during my term. This is a total falsehood and the minutes of the corporation will clearly show that I did attend board meetings and that I also served on the personnel committee. Mr. Smith further goes on to say that I did not take an active role in the formation or management of the business. This is debatable at best and I take this as an example of the misrepresentations Mr. Smith have made throughout the history of this litigation to gain a tactical advantage. Mr. James A. Hagedorn, President of The Merchants Bank of Florida, can testify about my efforts to help the corporation to obtain an emergency loan from Pan American Bank of Tampa when Mr. Hagedorn was the Chief Executive Officer of the Bank. it is obvious that Mr. Smith is making these misrepresentations and distortions for the willful and purposeful intent of fraudulently seeking to influence The Travelers Insurance Company to settle the law suits he has filed on behalf of his clients and himself. Mr. Smith in his letter stated another misrepresentation that I refused to sign over my stock certificates after the corporation had been sold to Capital Cities. This is not

true. In fact I had to file a Motion to prevent the dissolution of the corporation before Mr. Smith's clients reluctantly paid me what was lawfully owed to me. The court records clearly indicate that it was because of the actions of Mr. Smith's clients that it became necessary to seek the aid of the court in order to get the funds released.

There are other instances of threats made to me. Attorney John A. Grant, Jr. calls me periodically and threatens to file grievances with the Florida Bar. Mr. Grant even told me in May, 1987 that I did not have the right of existence much less to be a member of The Florida Bar. Recently Mr. Grant told one of my attorneys that he intends to file a malicious prosecution suit against me. At the very core of Mr. Grant's concern is his conduct relative to his creditors. In 1982 Mr. Grant experienced extreme financial difficulties. This was known to all the directors of Family Television Corporation. Mr. Grant made certain financial arrangements with his creditors. However, after agreeing to these financial arrangements Mr. Grant transferred all of the stock he owned in Family Television Corporation to his wife, Beverly Grant. This is certainly questionable but not necessarily illegal. At the time the assets of Family Television Corporation were sold Mr. Grant signed a Non-Compete agreement for the sum of $112,500 payable over a three year period. (A copy of the Non-Compete Agreement is attached hereto). However, in order to avoid his creditors, Mr. Grant had the money paid to his wife. Beverly Grant never served on the Board of Directors of Family Television Corporation nor did she ever take an active role in the management of the corporation. When I was offered a substantially lower sum of money I asked what was the criteria used to determine who got the larger shares of the Non-Compete money. I never received an answer. This is the genesis of this whole dispute.

Mrs. Grant was not only the beneficiary of the generosity of the Board of Directors of Family Television Corporation. The two option holders, both of whom owned less stock than I did, and who served on the Board of Directors during the same term as I did, were paid $112,500 each for executing a Non-Compete Agreement. A convicted RICO racketeer who had served on the Board of Directors at the same time I did was also given $112,500. Yet no one could tell me why I was treated differently.

Mr. Grant is also fearful of explaining the fact that he received preferential treatment in the dealings of Family Television Corporation. In 1983 a new stock offering was made. Each

shareholder was offered on a pro rata basis the opportunity to purchase shares during a specific time. After the expiration of the offering period, and totally unknown to those persons outside of the then board of Directors, Mr. Grant was allowed to purchase a substantial block of stock. It should be noted that a few months after this secret sale to Mr. Grant the sale of the assets of Family Television Corporation to Capital Cities Communications, Incorporation became public to the rest of the shareholders.

In 1983 when Mr. Grant was in financial difficulty, he decided to sell some of his stock in Family Television Corporation. Mr. Grant requested and received a waiver of the corporation's first right of refusal to purchase his stock. He then proceeded to obtain the waiver of the individual shareholders. Shortly after Mr. Grant's request to sell I made the exact same request. My request was delayed. In order to sell I was told that I would have to complete some obnoxious documents related to race, and nationality that no other shareholder of the corporation had ever before been asked to complete. The contention was that I might be selling to some foreign interest which might violate the FCC rule prohibiting no more than 15% ownership by foreign interest in the assets of a licensee. If I had sold my entire interest it would have amounted to less than 4% of the corporation. Eventually I was forced to sell my stock within the group and to the friends of Mr. Grant. Approximately four or five months after I was forced to sell my stock under restrictive terms and conditions, Mr. Wheeler was allowed to sell some of his stock in the very same manner as Mr. Grant had been allowed to earlier in the year without any of the odious restrictions being applied.

It should be noted that at all times relevant hereto the law firm of Mr. Grant and Mr. Peavyhouse was legal counsel to Family Television Corporation. The firm was paid by the corporation for legal work performed.

Mr. Smith's clients are also fearful of it becoming public knowledge that certain false documents were filed with the Federal Communications Commission. Mr. Smith's client's advised the FCC at the time of the filing of the application for the license to operate WFTS that there would be no more than ten (10) shareholders each owning no less than 10,000 shares. (See original Stock Subscription Agreement attached hereto). Later Mr. Smith's clients realized it would be beneficial in obtaining the license to have black participation. Rev. A. Leon Lowry, and myself were asked to participate in the venture. However, we were not allowed

to purchase 10,000 shares as the other subscribers. We were only allowed to purchase 5,000 shares and it took the two of us to equal one full shareholder. (See copy of the Addendum to Stock Subscription Agreement attached hereto). The tragic fact is that through chicanery Mr. Smith's clients concealed the fact that the black participants were supposed to have equal ownership with the other investors. We were never advised of this fact. (See copy of Deposition of Rev. A. Leon Lowry attached hereto). The original Stock Subscription Agreement was deceptively kept from us until after litigation was commenced.

Mr. Smith and his client, Attorney Louis de la Parte, in the spring, 1987, retained an investigator by the name of C. G. "Steve" Stephens to conduct an investigation of me to come up with anything that would discredit me. Mr. Stevens was suppose to be looking for any kind of sexual misconduct, dishonesty, deceit or other conduct which could be used against me. The ironic thing about this is that Mr. Stevens' firm had done work for my office and had been privy of privileged information pertaining to my clients and myself.

If you have any questions please contact me at your earliest convenience.

Sincerely,

/s/ Nathaniel W. Tindall, II
Nathaniel W. Tindall, II

NWT/jd

cc: Scott Tozian, Esquire
Landmark Building, Suite 909
412 East Madison Street
Tampa, Florida 33602

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,531
TFB -87-26,02013D

THE FLORIDA BAR,

Complainant,

vs.

NATHANIEL W. TINDALL, II,

Respondent.

RESPONDENT'S MOTION TO STRIKE THE RECOMMENDATION OF THE REFEREE

COMES now Respondent and brings this Motion to Strike the Recommendations of the Referee and in support thereof would state:

1. The Referee in his report of September 13, 1988 recommends that Respondent be found guilty of violating Disciplinary Rules 7-102 (A)(1) and 8-102(B).

2. That the chief accuser and only witness against Respondent at the disciplinary hearing was Hugh N. Smith, Esquire.

3. Through sheer coincidence Respondent came across the case of *GREAT AMERICAN MANAGEMENT & INVESTMENT vs. FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A., et al.,* 430 So.2d 545 (Fla. 2nd DCA 1983).

4. The law firm of Fowler White et. al., is a party defendant in this case along with the law firm of Grimes, Goebel, Pary, Blue and Boylston.

5. During the pendency of this litigation, Hugh N. Smith, was head of the business litigation department of Fowler White in Tampa. (Page 66 of the transcript of proceedings before the Referee.)

6. The Referee, the Honorable Robert J. Boylston, was

involved in this litigation as a member of the firm of Grimes, Goebel, Pary, Blue and Boylston and also individually. Hugh N. Smith, Esquire and the Referee, through their respective firms and individually, had a consistency of interest which would be prejudicial against Respondent in the instant matter.

7. That at no time during the disciplinary proceedings, did the Referee disclose or acknowledge the fact of this consistency of interest between he and Hugh N. Smith.

8. The Florida Bar contends in its reply brief that the referee accepted Mr. Smith's testimony and rejected the uncontradicted testimony of Respondent.

9. Hugh N. Smith denied at the hearing on June 17, 1988 that he told Respondent that Respondent should drop the lawsuit against his clients since the Trial Judge and Defendant Russell K. Peavyhouse were close personal friends.

10. That due to the perceived prejudice of the Referee, Respondent's right of due process of law under the Florida Constitution and United States Constitution has been violated in that under the rules of procedure and evidence, the testimony of Hugh N. Smith should be disregarded. This is due to the fact:

a. That Hugh N. Smith had to cover-up the perjured affidavit of Ian Wheeler. Mr. Smith knew or reasonably should have known, that the testimony of Mr. Wheeler was perjury, yet he recklessly failed to prevent this fraud upon the trial court and in fact aided and abetted this criminal activity. Interestingly enough, Mr. Smith testified that he saw no inconsistency in the deposition testimony and affidavit of Ian Wheeler. (Page 71 of the Transcript of Disciplinary Proceedings).

b. That a relationship did exist between the Trial Judge and Russell K. Peavyhouse which Respondent did not know of prior to being advised by Mr. Smith. The relationship was later acknowledged by Russell K. Peavyhouse.

c. That Hugh N. Smith, knew or reasonably should have known, of the close personal relationship between the Trial Judge and his client Russell K. Peavyhouse. However, Mr. Smith contends that until

two months before his testimony at the Florida Bar proceeding on June 17, 1988, that he had had no contact with Mr. Peavyhouse since 1984. Mr. Smith further contends that prior to May 15, 1986, he was not informed that Mr. Peavyhouse was an acquaintance or friends with Judge Cheatwood. (Pages 66-70 of the transcript of disciplinary proceedings). It defies logic and reason to believe that in spite of becoming aware of the relationship in 1986 and the serious implications involved, Mr. Smith did not have any discussions with Mr. Peavyhouse until two years later.

d. That Hugh N. Smith, Esquire, made direct threats against the life, liberty, and property of the Respondent before three attorneys, one of whom was a member of the grievance committee of the Ninth Judicial Circuit. Mr. Smith, however, denies that he made such statements.

11. The testimony of Hugh N. Smith should be totally disregarded since his credibility was impeached, and he had motive and reason to lie.

12. That in the ordinary course of due process, the testimony of Mr. Smith would have been impeached and disregarded. Respondent, however, fears that because of the relationship and the consistency of interest in the above cited litigation, the Referee is prejudice against the Respondent.

WHEREFORE, Respondent prays that this court will enter an order dismissing the recommendations of the Referee and make a determination independent of any recommendations of the Referee.

Respectfully submitted.

/s/ Nathaniel W. Tindall, II
Nathaniel W. Tindall, II
205 West Buffalo Avenue
Suite 103
Tampa, Florida 33603
Florida Bar #: 176524

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Richard A. Greenberg, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, and Scott Tozian, Esquire, 109 North Brush Street, Suite 150, Tampa, Florida 33602, by U.S. Mail this 16th day of February, 1989.

/s/ Nathaniel W. Tindall, II
Nathaniel W. Tindall, II

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO.: TFB #87-26,020-13D
(formerly #13D87H87

THE FLORIDA BAR,

Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent.

MOTION TO DECLARE DR7-102(A)(1) and DR8-102(B) UNCONSTITUTIONAL IN THEIR APPLICATION AS BEING VIOLATIVE OF DUE PROCESS, EQUAL PROTECTION, AND THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondent files this Motion To Declare DR7-102(A)(1) and DR8-102(B) as unconstitutionally applied in this matter in that the Florida Bar seeks to violate the constitutional rights of the Respondent. The Florida Bar has charged the Respondent with making false accusations against a judge when in fact the record is totally devoid of any accusation made against a judge. It is only by inference that such conclusion can be reached. Furthermore, in violation of the First Amendment to the Constitution of the United States, the Florida Bar seeks to "chill" the thought processes of the Respondent. Respondent has testified of what was meant by the references in the complaints as to the bribery allegations and the uncontradicted testimony of Plaintiff has not been refuted at all by the Florida Bar. What Respondent thought at the time the complaint was drafted can only be testified to by the Respondent. If on the face of the complaint there is nothing that could be taken as a false accusation against a judge, then any inquiry into what Respondent thought must be limited to the explanations given by Respondent of what his thought processes were at the time the complaint was drafted. Neither the Florida Bar nor the Referee can make their own decisions as to what Plaintiff was thinking at the time the complaint was drafted. Such is totally improper, prohibited by the First Amendment to the Constitution of the United States and is a means of controlling the thought processes in violation of the constitutional safeguards of a democratic society.

MEMORANDUM

First and Fourteenth Amendment rights of free speech and free association are fundamental and are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Gibson v. Florida Legis.ative Investigative Committee,* 372 U.S. 539(1962). The first amendment gives freedom of mind the same security as freedom of conscience. *Thomas v. Collins,* 323 U.S. 516(1945), citing *Priece v. Society of Sisters,* 368 U.S. 510, *Meyer v. Nebraska* 262 U.S. 390, and *Prince v. Massachusetts,* 321 U.S. 158. The State's power to make inquiries about a person's belief's or associations is limited by the First Amendment. *Baird v. State Bar of Arizona,* 401 U.S. 135(1970).

The essence of the problem here is that the Florida Bar and the Referee are attempting to go into Respondent's mind to make a determination as to what his beliefs are. This is totally unconstitutional and is a total disregard of the rights of the Respondent.

The testimony of the Respondent at the disciplinary hearing on June 17, 1988 was uncontradicted. At the heart of the matter is the fact that a Judge engaged in unethical conduct by not recusing himself from a case involving a close personal friend that he has had extensive business dealings with for a number of years. The unchallenged allegations are that perjury was committed by a party and that the trial judge overlooked this perjury. The fact of the matter that by overlooking the perjury the beneficial interest Russell K. Peavyhouse, the friend of the trial judge, would be benefited.

Respondent has testified that in drafting the complaint that he was not concerned about the conduct of the trial judge but only of the acts of the Defendants in the litigation. There was nothing on the record to contradict this statement made by the Respondent. The laws of the State of Florida clearly support Respondent's position that bribery could be alleged against persons other than the public officials for conduct in official proceedings. However, the Florida Bar and the Referee contend that on this basis that the Respondent has made false accusations against the judge. This is not so under the applicable law and under the evidence presented at the disciplinary hearing. The Referee can only make a decision based upon the evidence presented in the record and not be rejecting the uncontradicted

testimony of the Respondent and making an independent decision as to what Respondent was thinking. The gist of the problem here is that the First Amendment does not condone such a practice.

A state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. *N.A.A.C.P. v. Button,* 371 U.S. 415, 439, citing *Schware v. Board of Bar Examiners,* 353 U.S. 232, *Konigsberg v. State Bar,* 353 U.S. 252 and *In re Sawyer,* 360 U.S. 622.

In *Konigsberg v. State Bar of California,* 353 U.S. 252(1957) Petitioner refused to answer questions of the Bar Examiners' relating to his political associations asserting First Amendment rights. The United States Supreme Court upheld Petitioners right to assert a First Amendment claim stating at page 273 of the decision that:

> "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated--free to think, speak, and act as members of an Independent Bar." (Citations Omitted).

Recently the Florida Supreme Court in the case of *The Florida Bar v. Brett S. Clark,* ____ So.2nd____, 13 FLW 449(1988) upheld the ethical duty of an attorney to advise the public of judicial wrongdoing. The court, however, held that the respondent did make false and unsubstantiated charges in a RICO action. Clark had filed a RICO suit and named as the Defendants the trial judge and the entire Eleventh Circuit Court of Dade County, Florida. The bases of his claim was that in ruling against Respondent's clients the trial judge had had ex parte communications with opposing counsel. The *Clark* case is entirely different from the matter here. In this instance at the very outset there is unethical conduct on the part of the trial Judge on the basis *Leigh v. Smith,* 503 So.2d 989(Fla. 5th D.C.A. 1987). There the courts stated that:

> "All persons who appear in court expect to receive

a determination of their cases based upon the merits of the case and not upon some extrinsic circumstances, such as friendship or enmity between judge and lawyer, or political persuasion of the judge, or his religious convictions, or his financial investments, or social contacts."

Concern about the neutrality of the trial Judge is discussed at length by the Florida Supreme Court in the case of *Livingston v. State*, 441 So.2d 1083(Fla. 1983). The Court in a Per Curiam opinion at page 1085 the court observed:

"This Court has recognized the sensitivity and seriousness involved whenever the issue of judicial prejudice is raised. We have stated that:

"Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modieum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

. . .

". . . It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.

"The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised. *Dickenson v. Parks*, 104 Fla. 577, 582-84, 140 So. 459, 462(1932). This Court has also expressed the view that:

"Every litigant, including the State in criminal

> cases, is entitled to nothing less than the cold neutrality of an impartial judge." It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. *State ex rel. Mickle v. Rowe,* 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).
>
> "In Florida, there are four separate expressions concerning the disqualification of trial judges, which are set forth in: (1) The Code of Judicial Conduct Canon 3-C; (2) section 38.10, Florida Statutes (1981); (3) Florida Rule of Criminal Procedure 3.230, which was adopted verbatim by this Court from a former statute, section 911.01, Florida Statutes (1967); and (4) Florida Rule of Civil Procedure 1.432.
>
> "The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Canon 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge."

The uncontraverted testimony of the Respondent at the disciplinary hearing was that the trial judge and Russell K. Peavyhouse had a strong close personal relationship. In addition there are a number of other serious allegations made by the Respondent that have not been questioned. The Florida Bar response to all this is to put Plaintiff's race into the controversy in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constution. The Florida Bar has no compelling reasons nor any medical evidence to support any suggestion that the Respondent is paranoid and has a complex against white people. Race has only been invoked in any of these proceedings by the Defendants in the litigation, and by the Florida Bar. However, the Respondent is suffering in these proceedings in a racially discriminatory manner since procedural due process

is not being applied. Respondent is subject to a different standard, different evidentary standard, constitutional safeguards are being discarded and Respondent is being subject to am arbitrary and capricious set of standards.

The referee should note the case of *The Florida Bar v. Shimek*, 284 So.2d 684 Fla. 1973. There the attorney in a memorandum filed in Federal District Court stated that the state trial judge avoided performance of his sworn duty because the judge was a product of the prosecutorial system which aided dramatically in elevating him to the bench. The Supreme Court tacitly approved of the manner in which the referee conducted the hearing. The referee stated that *"this court now is confronted with determining whether the memorandum, standing alone, without explanation subjects its author to discipline. The attorney's later explanation can properly be considered only in mitigation."* (Emphasis added). The referee further went to say, "Judges are subject to fair criticism. The attorney is bound to use restraint. His statements must be prudent, not rash, irresponsible, and without foundation. The motivation must be of desire to improve the Courts, not to destroy public confidence." Throughout this disciplinary proceeding somewhere in the whole maze of charges and accusations respect for the rule of law is certainly questioned. The reason for this is in spite everything Respondent has made certain serious allegations that are uncontradicted. Evidence that has come forth in collateral matters certainly attest to the truth of any statements made by Respondent. Lost is the realization that truth is an absolute defense and that truth of the matters overcome any claim of maliciousness under the standards of *New York Times Company v. Sullivan*, 376 U.S. 254(1964).

The notion that the Respondent has done something to maliciously hurt another by bringing a RICO action is not supported by any legal standard. Most recently the Florida Supreme Court in the case of *The Florida Bar v. Clark, Supra*, did not find any maliciousness in Attorney Clark naming a judge and the entire judiciary of the Eleventh Judicial Circuit in a RICO act. In addition just because persons may object to being labeled as racketeers is no justification for maliciousness to be found in bringing a RICO action. In addition it should be noted that it is not criminal convictions that give rise to the RICO cause of action but it is conduct. Justice White, in *Sedima, S.P.R.L. v. Imrex Company, Inc.* ____ U. S. ____ 105 S.C.t. 3275(1985) discussed the racketeering concerns, criminal convictions, and standards of proof in this fashion:

"The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. See §§ 1961, 1962, 1964(c). To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable," and "offenses[s]" that are "punishable," under various criminal statutes. § 1961(1). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be. See also S.Rep. No. 91-617, p. 158 (1969): "a racketeering activity . . . must be an act in itself subject to criminal sanction: (emphasis added). Thus, a prior conviction requirement cannot be found in the definition of "racketeering activity." Nor can it be found in § 1962, which sets out the statute's substantive provisions. Indeed, if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the government to enjoin violations that had not yet occurred.

"The Court of Appeals purported to discover its prior conviction requirement in the term "violation: in §1964(c). 741 F.2d, at 498-499. However, even if that term were read to refer to a criminal conviction, it would require a conviction under RICO, not of the predicate offenses. That aside, the term "violation" does not imply a criminal conviction. See *United States v. Ward*, 448 U.S. 242, 249-250, 100 S.Ct. 2636, 2641-2642, 65 L.Ed.2d 742(1980). It refers only to a failure to adhere to legal requirements. This is its indisputable meaning elsewhere in the statute. Section 1962 renders certain conduct "unlawful"; § 1963 and § 1964 impose consequences, criminal and civil, for "violations" of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections.

"The legislative history also undercuts the reading of the court below. The clearest current in that history is the reliance on the Clayton Act model, under which private and governmental actions are entirely distinct. *E.g. United States v. Borden Company*, 347 U.S. 514, 518-519, 74 S.Ct. 703, 706-707,98L.Ed.903(1954). The

only specific reference in the legislative history to prior convictions of which we are aware is an objection that the treble damages provision is too broad precisely because "there need not be a conviction under any of these laws for it to be racketeering." 116 Cong.Rec. 35342(1970) (emphasis added). The history is otherwise silent on this point and contains nothing to contradict the import of the language appearing in the statute.

"The Court of Appeals was of the view that its narrow construction of the statute was essential to avoid intolerable practical consequences. First, without a prior conviction to rely on, the plaintiff would have to prove commission of the predicate acts beyond a reasonable doubt. This would require instructing the jury as to different standards of proof for different aspects of the case. To avoid this awkwardness, the court inferred that the criminality must already be established, so that the civil action could proceed smoothly under the usual preponderance standard.

"We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. See, *e.g., United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 D.Ct. 1099, 79 L.Ed.2d 361 (1984); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 235,93 S.Ct. 489, 492, 34 L.Ed.2d 438 (1972); *Helvering v. Mitchell,* 3030 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938); *United States v. Regan,* 232 U.S. 37, 47-49, 34 S.Ct. 213, 216-217, 58 L.Ed. 494 (1914). There is no indication that Congress sought to depart from this general principle here. See Measures Relating to Organized Crime, Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 388 (1969) (statement of Assistant Attorney General Wilson); House Hearings, at 520 (statement of Rep. Steiger); id., at 664 (statement of Rep. Poff); 116 Cong.Rec. 35313 (1970) (statement of Rep. Minish). That the offending conduct is described by reference to criminal statutes does not mean that its occurrence

must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. *Cf. United States v. Ward, supra,* 448 U.S., at 248-251, 100 S.Ct., at 2641-2642. But we need to decide the standard of proof issue today. For even if the stricter standard is applicable to a portion of the plaintiff's proof, the resulting logistical difficulties, which are accepted in other contexts, would not be so great as to require invention of a requirement that cannot be found in the statute and that Congress, as even the Court of Appeals had to concede, 741 F.2d, at 501, did not envision.

"The court below also feared that any other construction would raise severe constitutional questions, as it "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." Id., at 500, n. 49. We do not view the statute as being so close to the constitutional edge. As noted above, the fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action. The familiar provisions for both criminal liability and treble damages under the antitrust laws indicate as much. Nor are attorney's fees "clearly punitive." Cf. 42 U.S.C. § 1988. As for stigma, a civil RICO proceeding leaves no greater stain than to a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of fraud beyond a reasonable doubt. Finally, to the extent an action under § 1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, *cf. One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed. 2d 170 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.

"Finally, we note that a prior conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 2333, 60 L.Ed.3d 931 (1979). This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice. See also n. 9, supra.

"In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

"In considering the Court of Appeals' second prerequisite for a private civil RICO action—"injury . . . caused by an activity which RICO was designed to deter"—we are somewhat hampered by the vagueness of that concept. Apart from reliance on the general purposes of RICO and a reference to "mobsters," the court provided scant indication of what the requirement of racketeering injury means. It emphasized Congress indeniable desire to strike at organized crime, but acknowledged and did not purport to overrule Second Circuit precedent rejecting a requirement of an organized crime nexus. 741 F.2d at 492: see *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5,21 (CA2 1983), cert. denied sub nom. *Moss v. Newman*, 470 U.S. ____, 104 S.Ct. 1280, 79 L.Ed2d 684 (1984). The court also stopped short of adopting a Competitive injury" requirement; while insisting that the plaintiff show "the kind of economic injury which has an effect on

competition;" it did not require "actual anticompetitive effect." 741 F.2d, at 496; see also id., at 495, n. 40.

> "The court's statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological. Nor is clarity furnished by a negative statement of its rule: standing is not provided by the injury resulting from the predicate acts themselves. That statement is itself apparently inaccurate when applied to those predicate acts that unmistakably constitute the kind of conduct Congress sought to deter. See id., at 496, n. 41. The opinion does not explain how to distinguish such crimes from the other the other predicate acts Congress has lumped together in § 1961(1). The court below is not alone in struggling to define "racketeering injury," and the difficulty of that task itself cautions against imposing such a requirement."

Under §1961(1)(A) the following "chargeable" state offenses qualify as predicate acts:

> Any act or threat *involving* murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law and punishable by imprisonment for more than one year. (Emphasis added).

Thus, the contention that the RICO action is malicious is not supported by law or fact. Respondent had the right to bring the RICO action.

It also should be noted that the heart, and substance of Respondent's RICO claim is mail fraud. Under Federal law mail fraud and bribery are punishable in the same degree. What is the controversy about bribery and not mail fraud?

/s/ Nathaniel W. Tindall, II
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205 West Buffalo Avenue, Suite 103
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(813) 237-3560
Florida Bar Number: 176524

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to RICHARD A. GREENBERG, ESQUIRE, Assistant Staff Counsel-The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, this 26th day of August, 1988.

/s/ Nathaniel W. Tindall, II
NATHANIEL W. TINDALL, II

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO.: TFB #87-26,020-13D
(formerly #13D87H87)

THE FLORIDA BAR.

Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent.

MOTION TO DECLARE THE DISCIPLINARY PROCEDURE UNCONSTITUTIONAL AND IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IMPOSING A BADGE OF INFERIORITY ON RESPONDENT

Respondent hereby brings this Motion To Declare The Disciplinary Proceedings Unconstitutional In Violation Of The Thirteenth Amendment To The United States Constitution in that the proceedings are arbitrary and capricious and have labeled Respondent with a Badge of Servitude And Inferiority. The people of the United States in abolishing slavery through their organic document did declare that all citizens of the United States would be subjected to the same rights, privileges and responsibilities. Respondent in this proceeding has been held to an entirely different standard than any other lawyer or other party in these judicial proceedings. The race of Respondent has been raised to support the Bar's complaint that Plaintiff suffered from some mental disorder or disease when in fact no medical evidence has been presented to substantiate this position. Furthermore, the Florida Bar contends that the Respondent has some complex against white people when in fact there is nothing in the record to support this conclusion. The fact that Respondent exposed unethical as well as possible criminal conduct has caused him to be accused of suffering some mental deficiencies. However, the allegations that Respondent has made against certain individuals has not been contradicted nor any evidence to the contrary presented. All statements made by Respondent have been factual allegations that the Florida Bar and the Referee refuse to consider in violation

of the Rules of Procedure, Rules of Evidence and Due Process.

Respondent's only conclusion is that because of race, Respondent is being subject to an entirely different set of standards in violation of the Constitution of the United States of America and the Constitution of the State of Florida. The Respondent is labeled with a Badge Of Inferiority strictly because of race and for no other valid and justifiable reason.

/s/ Nathaniel W. Tindall, II
NATHANIEL W. TINDALL, II
205 West Buffalo Avenue, Suite 103
Tampa, Florida 33603
(813) 237-3560
Florida Bar Number: 176524

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Richard A. Greenberg, Esquire, Assistant Staff Counsel-The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, by hand-delivery, this 26th day of August, 1988.

/s/ Nathaniel W. Tindall, II
NATHANIEL W. TINDALL, II

STATE OF FLORIDA
TWELFTH JUDICIAL CIRCUIT
BRADENTON, FLORIDA 33505

ROBERT J. BOYLSTON
CIRCUIT JUDGE

September 13, 1988

The Honorable Sid J. White
Clerk, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

Re: The Florida Bar v. Nathanial W. Tindall, III;
Case No. 71,531

Dear Mr. White:

Please find enclosed herewith the report of Referee that I have prepared in the above matter containing my recommendations.

Under separate cover, I am sending you the original pleadings, the transcript, and all exhibits. Included in the pleadings are two motions that were filed by the Respondent before me on the date of the last hearing, August 26, 1988 questioning the constitutionality of the Disciplinary Rules and the proceedings involved herein. My recommendation as Referee would be that both of these motions be denied. However, I feel that they are directed to the Court rather than to me, as Referee.

Best regards,

Very truly yours,

/s/ Robert J. Boylston
Referee

RJB/er

cc: Richard A. Greenberg, Esq.
Scott K. Tozian, Esq.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case No. 71,531
TFB #87-26,020-13D
(formerly #13D87H87)

THE FLORIDA BAR,

Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent.

REPORT OF REFEREE

I. **Summary of Proceedings:** Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

June 17, 1988
August 26, 1988

The following attorneys appeared as Counsel for the parties:

For The Florida Bar **Richard A. Greenberg, Esq.**
For The Respondent **Scott K. Tozian, Esq.**

II. **Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged:** After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. In August, 1984, Respondent filed a Declaratory Judgment action in the Circuit Court of Hillsborough County in which he, as Plaintiff, sought a determination of his rights in regard to a business transaction. (T 20) The case was eventually assigned to Judge J. C. Cheatwood. During the course of the litigation, Judge Cheatwood made several rulings adverse to Respondent. (T 24-25) Respondent testified that, after a hearing held in May, 1986, an attorney for the Defendants in the case told Respondent that he would never win the case because the Judge and one of the

Defendants were good friends. (T 29) Respondent filed a Motion to Disqualify Judge Cheatwood in June of 1986 (Bar Exhibit 3) and filed a Notice of Voluntary Dismissal immediately prior to the hearing on that motion. (T 35-36)

2. In December of 1986, Respondent filed a Complaint in the United States District Court, Middle District of Florida, Tampa Division, (Bar Exhibit 5) in which Respondent, as Plaintiff, alleged racketeering activities on the part of the Defendants named therein.

3. Paragraph 3 of the Complaint stated:

> "This is an action based upon the racketeering activities of mail fraud, wire fraud, *bribery*, extortion, perjury, *corruptly trying to influence a public official*, civil theft, fraud and the sale of securities, bankruptcy fraud, and other crimes which will be identified in the course of this litigation."

4. Paragraph 111 of said Complaint stated:

> "Defendants eventually got a favorable ruling from their 'friendly' Circuit Judge . . ."

5. Under the heading, Act XII, of the Complaint the following paragraphs were stated:

> "163. That after suit was filed in the State Circuit Court, the Defendants came up with a fraudulent scheme to corruptly influence a public official.
>
> "164. Sometime after suit had been filed, for reasons unknown to Plaintiff, the court file was reassigned to another Judge.
>
> "165. Unknown to Plaintiff at the time, but known to all the Defendants, was the fact that there was a close personal relationship between the Defendant Peavyhouse and the trial judge.
>
> "166. As a result thereof, Defendants contrived an illegal scheme to corruptly use their influence for an advantage in litigation.

". . . .

"169. The Defendants use (sic) their influence to commit bribery of a public official.

6. These same allegations were repeated in an amended Complaint filed in the United States District Court case on December 3, 1987 (Bar Exhibit 7), as set forth in Paragraphs 3, 118, and the allegations of Act XIII thereof.

7. Respondent testified that the "public official" referred to in the Federal Court Complaints included Judge Cheatwood. (T 42) He also testified that the "friendly Circuit Judge" referred to Judge Cheatwood. (T 56) Respondent testified that he had no evidence to establish any improper activity on the part of Judge Cheatwood (T 62;174) and that, to this day, he does not know whether Judge Cheatwood had been improperly influenced. (T 175)

III. **Recommendation as to Whether or Not the Respondent Should Be Found Guilty:**

I recommend that Respondent be found guilty and specifically that he be found guilty of violating Disciplinary Rules 7-102 (A)(1), by asserting a position when it is obvious that such action would serve merely to harass or maliciously injure another; and 8-102 (B) by knowingly making false accusations against a Judge. I recommend that the Respondent be found not guilty of violating the other Disciplinary Rules cited in the Complaint.

It is noted that the Complaint filed in the Federal Court (Bar Exhibit 5) was filed by Respondent in December, 1986. The Amended Complaint (Bar Exhibit 7) was not filed until after the Rules Revisions that became effective on January 1, 1987.

IV. **Recommendation as to Disciplinary Measures to be Applied:**

I recommend that the Respondent receive a public reprimand.

V. **Personal History and Past Disciplinary Record:** After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to-wit:

Dated admitted to Bar: **May 10, 1974**

Prior disciplinary convictions and disciplinary measures imposed therein: **None**

VI. **State of Costs and Manner in Which Cost Should be Taxed:**

I find the following costs were reasonably incurred by The Florida Bar.

GRIEVANCE COMMITTEE LEVEL

Administrative Costs	$	150.00
Grievance Committee Hearing (7-1-87) Staff Counsel Expense		4.35

REFEREE LEVEL

Administrative Costs	$	150.00
Deposition (3-23-88) Court Reporter Costs		141.00
Hearing (6-17-88) Court Reporter Costs		852.50
Staff Counsel Expense		50.45
Hearing (8-26-88) Court Reporter Costs	$	115.40
Staff Counsel Expense		37.35
TOTAL COSTS TO DATE	$	1,501.05

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent.

DATED this 13th day of September, 1988.

/s/ Robert J. Boylston

ROBERT J. BOYLSTON, REFEREE

Copies furnished to:

Richard A. Greenberg, Esq., Bar Counsel

Scott K. Tozian, Esq., Counsel for the Respondent

Staff Counsel of the Florida Bar
Tallahassee, Florida 32301-8226

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case No.
TFB #87-26,020-13D
(formerly #13D87H87)

THE FLORIDA BAR,

Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent.

COMPLAINT

THE FLORIDA BAR, complainant, files this Complaint against Nathaniel W. Tindall, II, respondent, pursuant to article XI of the Integration Rule of The Florida Bar, as amended, and Rule 3-3.2(a), Rules of Discipline, and alleges:

1. The respondent is, and at all times mentioned in this Complaint was, a member of the Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On or about December 31, 1986, respondent filed a Complaint in the United States District Court, Middle District of Florida, Tampa Division in the case styled *Nathaniel W. Tindall, II v. Louis de la Parte, Henry A. Ash, Ian A. Wheeler, Russell K. Peavyhouse, Glen S. Hooper, M. D. and John A. Grant, Jr.*, Case No. 86-1902-Civ.-T-15A. (Exhibit 1).

3. In his Complaint, the respondent alleged that the defendants, among other things, committed ". . . bribery . . . corruptly trying to influence a public official . . ."

4. The public official mentioned above is later identified in the Complaint as being the "friendly circuit judge" who presided over the case of *Nathaniel W. Tindall, II v. Family Television Corporation, Inc., et al.*, Case No. 84-12436, Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Civil Division, Division "F". The presiding judge in said case was the

Honorable Judge J. C. Cheatwood.

5. On or about May 5, 1987, respondent filed an Amended Complaint in the above-referenced case. (Exhibit 2).

6. In his Amended Complaint, respondent alleged that the defendants, among other things, "used their influence to commit bribery of a public official."

7. The "public official" mentioned in paragraph 6 above is Judge J. C. Cheatwood.

8. Respondent filed the Complaint mentioned in paragraph 2 above, and the Amended Complaint mentioned in paragraph 5 above, knowing it would serve merely to harass or maliciously injure Judge Cheatwood and/or the defendants. In the alternative, it is obvious that respondent's filing of the aforementioned Complaints would serve merely to harass or maliciously injure another.

9. The allegations set forth in the Complaint mentioned in paragraph 2 above, and in the Amended Complaint mentioned in paragraph 5 above, are unwarranted under existing law and respondent knew this at the time he filed said Complaint and Amended Complaint.

10. The allegations in the Complaint mentioned in paragraph 2 above, and in the Amended Complaint mentioned in paragraph 5 above, which refer to the relationship of the defendants and Judge Cheatwood are undignified or discourteous and are degrading to a tribunal.

11. The respondent has knowingly made false accusations against Judge Cheatwood in Act XII of the aforementioned Complaint and in Act XIII of the aforementioned Amended Complaint, alternatively, respondent made the accusations recklessly without a proper investigation as to whether or not the accusations were true.

12. On or about September 18, 1987, respondent executed a Waiver of Probable Cause Hearing in this matter. (Exhibit 3).

13. By reason of the foregoing, respondent has violated DR 7-102(A)(1) (a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client

when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another); DR 7-102(A)(2) (a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law); DR 7-106(C)(6) (in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal); and DR 8-102(B) (a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer).

WHEREFORE, The Florida Bar respectfully prays that respondent be appropriately disciplined in accordance with the Rules of Discipline of the Florida Bar.

/s/ C. Timothy Corcoran III
C. TIMOTHY CORCORAN
Chairman
Thirteenth Judicial Circuit
Grievance Committee B
P. O. Box 3239
Tampa, FL 33601
(813) 223-7000

/s/ R. A. Greenberg
RICHARD A. GREENBERG
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(813) 875-9821

John F. Harkness
Executive Director
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

/s/ John T. Berry
JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Scott K. Tozian, Counsel for Respondent, Smith and Tozian, 412 E. Madison Street, Suite 909, Tampa, FL 33602 by regular U. S. Mail, on this 3rd day of December, 1987.

John T. Berry
John T. Berry